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No. 1

In The
Supreme Court of the United States

DAWN GEORGETTE MYERS,
Petitioner,

v.

CENTRAL FLORIDA INVESTMENTS, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a reasonable jury find that retaliation by filing frivolous, unrelated lawsuits against an employee to punish her complaints of sexual harassment is adversity enough to meet the standard for Title VII retaliation?

2. Where a sexual harasser is CEO and sole shareholder of a company, are his acts the acts of the company and is a complaint to him a complaint to the company?

3. Where an employee who refuses sexual advances demonstrates some likelihood that her employer has lied in producing a nondiscriminatory reason for her termination, is she entitled to present her case to a jury?

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here are Petitioner Dawn Georgette Myers and Respondents David Siegel, Central Florida Investments, Inc., CFI Sales & Marketing, Ltd., Westgate Resorts, Inc., Westgate Resorts, Ltd., Westgate Lakes, Inc., and Westgate Lakes, Ltd.

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OPINIONS BELOW

The August 6, 2007, order of the Eleventh Circuit Court of Appeals, denying motions for rehearing and rehearing *en banc*, which is not officially reported, is reproduced as Appendix A at 1a. The June 11, 2007, opinion of the Eleventh Circuit Court of Appeals affirming in part, vacating in part, and remanding, which is not officially reported, is reproduced as Appendix B at 3a. The April 25, 2006, judgment for defendants in the U.S. District Court for the Middle District of Florida, which is not officially reported, is reproduced as Appendix C at 16a. The April 24, 2006, order granting summary judgment for defendants in the U.S. District Court for the Middle District of Florida, which is not officially reported, is reproduced as Appendix D at 18a.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on June 11, 2007. A timely petition for rehearing and rehearing *en banc* was denied on August 6, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, (hereinafter Title VII), is set forth below.

§ 2000e-2. Unlawful employment practices.

(a) Employer practices

It shall be an unlawful employment practice for an employer -

> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-3(a), [Retaliation]

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Petitioner seeks certiorari to establish that the degree of adversity necessary for a retaliatory action under Title VII to be actionable is a jury question, that the acts of a high company official are acts of the company under Title VII, and that a jury question exists on a firing where there is evidence that the employer's nondiscriminatory reason is a lie.

Defendant Central Florida Investments, Inc., (CFI) is a corporation that owns and manages timeshare

resorts throughout the United States. Defendant David Siegel (Siegel) is the president and sole shareholder of CFI and its related entities. In 1986, Georgette Myers (Myers) started selling timeshare interests at one Respondents' resorts. Siegel accepted Myers' plan to create Papillon Spa at Westgate Lakes and eventually named her the initial Executive Director of the spa.

Starting in 1996 and continuing until Myers' final days of employment in December of 2000, Siegel aggressively pursued a sexual relationship with Myers. Siegel's unwelcome acts of harassment included kissing Myers without her consent, rubbing and fondling her legs during business meetings, making sexual comments, slapping her on the butt, soliciting her for prostitution, pressing his body into hers, exposing her to full frontal nudity, telling her his sexual fantasies, pinning her against the wall and pressuring her to have a *menage a trois* with him and his wife.

Myers rejected all of Siegel's sexual advances and repeatedly insisted that he stop this conduct. The Court of Appeals found the harassment sufficient to warrant reversal of the district court's summary judgment on the hostile environment claim. Trial on that is set for February, 2008.

In April of 2000 Myers started dating a man who would later become her fiancé. Siegel's jealousy was such that the company's chief operating officer told Myers that, to Siegel, her relationship with the fiancé was "waving a red flag in front of a bull."

Fearing adverse action, Myers went to Siegel to recount the foregoing and ask for a written contract. Siegel said Myers had his word and that was her contract -- she was not going to be fired. This was November, 2000. Myers had rejected Siegel's sexual advances for over five years.

Siegel fired Myers on December 12, 2000. Security escorted her out of the building. In the summary judgment proceedings, the company offered a lack of profitability of the Spa as a sole excuse for the firing. There was much evidence that profitability was a dishonest reason.

Siegel undermined Myers' management of the spa, blocking all the actions she needed to turn a profit. He restricted marketing to timeshare owners only, refusing to let Myers market to the local community. He made Myers give substantial discounts to the timeshare owners and to company executives and their spouses, despite Myers' warning that the spa would lose money on each service performed to those customers. He told Myers to give Westgate employees free gym memberships. The company rebuffed Myers' marketing plans. The company excluded Myers and the spa from the company's customer service training sessions.

Myers' research in the spa industry revealed that spas typically do not make money first year. Before the spa opened, Myers shared her research with Siegel and explained that the spa would not turn a profit unless it was marketed to the local community because timeshare owners are at the resort for a limited number of days per year, meaning there would be no

repeat business. The company set the staff salaries too high over Myers' objection.

After Myers' firing, the spa continued to lose money under a male manager for two more years. The male manager was not fired, despite lack of profitability. Myers did extensive research of the spa industry, learning that if a spa is set up properly it will make a profit after its third year. The spa made its first net profit in 2003, exactly three years after it opened, just as Myers had said.

Respondents repeatedly changed their excuse for Myers' firing over the course of the litigation. On April 6, 2001, counsel for Respondents informed the EEOC that Myers was fired because of allegations of mismanagement made during an investigation of the complaints of an employee. On other occasions, the company has offered the excuse that Myers served wine to employees, sent an employee to clean Siegel's condo while she lived there, and made remarks about Siegel and his wife soliciting her for a sexual threesome. The company abandoned all excuses other than profitability for purposes of summary judgment.

Even so, district court relied upon the multiple excuses in finding the firing nondiscriminatory. The court of appeals conceded this was probably error, but held that the profitability excuse, standing alone, was reason enough for the firing. Appendix, 14a. The court of appeals did not acknowledge or consider that the ever-changing excuses were themselves evidence that the profitability story was a lie. Nor did the court explain why a reasonable jury could not be legitimately

persuaded by the massive other evidence that the profitability excuse was a lie.

The court of appeals did not explain why it gave no weight to Myers' complaints to Siegel himself as protected conduct in the retaliation calculus. The court discounted her complaints to other executives as protected conduct because by then the company had already expressed concerns about profit. Appendix, 13a. A jury would not be allowed to consider a nexus between protected activity and retaliatory conduct where the protected conduct came after some initial expressions of concern about some aspect of employee performance.

Some ten months after the firing, on September 5, 2001, Respondents sued Myers for the costs of the home renovations that Myers received in lieu of taking her vacation time.

On September 14, 2001, Myers filed a sexual harassment complaint against Respondents with the Florida Commission on Human Relations (FCHR) and Equal Employment Opportunity Commission (EEOC).

On April 5, 2004, Siegel sued Myers for an $8,000 loan that she had repaid on June 6, 2000. That suit morphed into this one with the promissory-note count dismissed and the sexual harassment counterclaims remaining after the court realigned the roles of the parties.

Both of Respondents suits were frivolous. Both cost suffering and expense to defeat. The court of appeals did not challenge that the suits were intended as

reprisal for protected conduct, but found instead that they were not harmful enough that they would have discouraged a reasonable employee from making or supporting a charge of discrimination. Appendix, 13a at n.3. The court did not explain why a reasonable jury could not conclude that the time, expense, and stress of defending two lawsuits against a powerful adversary might chill one from making a complaint.

REASONS FOR GRANTING THE WRIT

I. A Jury Must Decide Whether Reprisals Are Severe Enough To Meet the Standard For Title VII Retaliation

Myers raised post-employment retaliation in the form of Respondents filing two frivolous lawsuits against her. One was for collection of a promissory note that had already been paid in full long before the suit. The other was for payment for renovations to Myers' home that were supposed to be in lieu of her vacation. The court of appeals rejected those lawsuits as a form of retaliation in this cryptic passage:

> As to Myers' post-termination retaliation claim, we find that her claim fails because she cannot show that Siegel's decision to file an unrelated lawsuit against her was an action that "would have been materially adverse to a reasonable employee or job applicant," such that "that the employer's actions [were] harmful to the point that they could well [have] dissuade[d] a reasonable worker from making or supporting a charge of discrimination," Burlington N. &

Santa Fe Ry. Co. v. White, 548 --- U.S. ----, 126 S.Ct. 2405, 2409 (2006).

Appendix, 13a at n.3.

It is not clear whether the panel's objection is to the nature of the retaliation or the severity of it.

Defending lawsuits takes time and money. Win or lose, the consequences can be ruinous. The prospect of two lawsuits as part of a wide-ranging campaign of retaliation for rejecting and protesting sexual harassment would strike fear into the heart of practically any employee. Certainly the panel is not justified in stating an apparent *per se* rule that anticipation of litigation as a consequence of engaging in protected conduct can not "dissuade a reasonable worker from making or supporting a charge of discrimination." The promissory note suit was for $8,000 plus interest. The renovation suit met the $15,000 jurisdictional minimum of a Florida circuit court. An ordinary working person recently thrown out of a job is disadvantaged even in an unworthy suit when she is up against an adversary with unlimited resources and an implacable grudge. Indeed, it is hard to see how any person would not be discouraged from filing a charge or making a complaint by the prospect of having to pay to defend two lawsuits.

Nor is retaliatory litigation outside the type of reprisal that supports a suit for Title VII retaliation. The Burlington Northern opinion cited by the panel recognizes abuse of the judicial system as a form of actionable retaliation. Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. __, 126 S.Ct. 2405, 2412

(2006) *citing*, Berry v. Stevinson Chevrolet, 74 F.3d 980, 984, 986 (10th Cir. 1996) (finding actionable retaliation where employer filed false criminal charges against former employee who complained about discrimination).

Whether Myers had a retaliation claim for the frivolous retaliatory suits was for the jury, not the panel of the court of appeals.

This Court in Burlington Northern held that whether a reasonable worker would likely be deterred from protected activity by a retaliatory act (and thus whether that act is serious enough to be unlawful) is ordinarily a question of fact to be resolved by the trier of fact. In most claims under Title VII and other anti-retaliation statutes the trier of fact will be a jury.

In Burlington Northern, this Court, in "[a]pplying this standard to the facts of this case," did not itself decide whether the two retaliatory acts at issue would in fact deter protected activity. Instead, the outcome turned on whether "there was a sufficient evidentiary basis to support the jury's verdict." 126 S.Ct. at 2416. This Court affirmed the jury verdict because "the jury's findings are adequately supported." Id.

White had been reassigned from operating a forklift to more demanding work in the rail yard. After reviewing the evidence that "the jury had before it" regarding the duties of the two jobs, the Court concluded that "[b]ased on this record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee." 126 S.Ct. at 2417. The Court

dealt similarly with the fact that White had been suspended without pay for thirty-seven days. Again, the Court summarized the evidence regarding the impact of that suspension on White, and determined that "the jury's conclusion that the 37-day suspension without pay was materially adverse was a reasonable one." 126 S.Ct. at 2418.

The majority opinion in Burlington Northern was notably different from the approach proposed by Justice Alito in his concurring opinion. Justice Alito assumed that it was for the courts to decide whether a retaliatory practice was serious enough to be unlawful. 126 S.Ct. at 2421-22.

After Burlington, some courts, including the court of appeals in this case, have simply disregarded the conclusion of the majority. The courts disregarding the majority holding decide the question themselves and, in so doing, nearly always find the retaliation not severe enough to be unlawful. By contrast, the courts that correctly frame the issue as one for the jury, almost always find that a reasonable jury could decide in favor of the employee.

For example, in Carmona-Rivera v. Puerto Rico, 464 F. 3d 14 (1st Cir. 2006), the court of appeals, in holding the retaliation lawful explained, "*We* turn to the retaliatory action alleged . . . and test it against the revised standard." 464 F. 3d at 20 (emphasis added). With regard to the question of retaliatory motive, the court agreed that the issue was whether "a reasonable jury" could such a motive, but that was mere recitation because the court itself took the jury's place in deciding whether those actions were

sufficiently serious to be unlawful. In Browne v. Queen's College City University of New York, 202 Fed. Appx. 523 (2d Cir. 2006), the Second Circuit made the relevant finding itself, holding that the alleged retaliatory act "does not, standing alone, constitute adverse employment action." Id. at 524. In Hanani v. State of New Jersey Dept. of Environmental Protection, 205 Fed. Appx. 71 (3d Cir.2006), the Third Circuit held that the alleged retaliatory act "does not rise to the level of material adversity." *See* Csicsmann v. Sallada, 2006 WL 3611729 *4 (4th Cir., Dec. 12, 2006) ("***we*** have never found" such retaliatory acts to be unlawful) (emphasis added); DeHart v. Baker Hughes Oilfield Operations, 214 Fed. Appx. 437 (5th Cir. 2007) ("***we*** conclude that the [alleged retaliatory act] would not have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (emphasis added); Mickelson v. New York Life Insurance Co., 460 F. 3d 1304, 1316 (10th Cir. 2006) ("[w]e easily conclude that the [alleged retaliatory actions] would 'dissuade[] a reasonable worker from making or supporting a charge of discrimination."). Mickelson departs from the trend of courts that decide the question themselves finding for the employer rather than letting a jury decide.

On the other hand, in Kessler v. Westchester County Department of Social Services, 461 F. 3d 199, 209-10 (2d Cir. 2006), the Second Circuit, in language closely tracking the holding in Burlington Northern, overturned an award of summary judgment because "a rational factfinder could permissibly infer that a reasonable employee in the position of [the plaintiff] could well be dissuaded from making a charge of discrimination if doing so would result in [the alleged

retaliatory act.]" The Second Circuit did so again in Wrobel v. County of Erie, 211 Fed. Appx. 71 (2d Cir. 2007), as did the Third Circuit in Moore v. City of Philadelphia, 461 F. 3d 331, 346-47 (3d Cir. 2006) and Ridley v. Costco Wholesale Corp., 217 Fed. Appx. 130 (3d Cir. 2007), and the District of Columbia Circuit in Velikonja v. Gonzalez, 466 F.3d 122, 124 (D.C. Cir. 2006). In Czekalski v. Peters, 475 F.3d 360, 365 (D.C. Cir. 2007), the District of Columbia Circuit held that "[w]hether a particular reassignment of duties constitutes an adverse action for purposes of Title VII is generally a jury question."[1]

It is thus a matter of importance that this Court resolve an apparent split among the circuits with one side of that split departing materially from Burlington Northern scarcely before the ink is even dry on it. The court below is among those departing from the precedent. This case is the right vehicle for an early correction.

II. A Complaint to The Top Executive Of A Company Is A Complaint to The Company, Even Where He Is The Offender

The court of appeals rejected complaints by Myers to other executives of the Respondent employer as protected conduct in the retaliation claim because those complaints post-dated concerns about

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[1] Petitioner is indebted to Professor Eric Schnapper of the University of Washington for first calling attention to this split in his unpublished work, *Burlington Northern v. White* in The Lower Courts: A Report on The First Year.

profitability. That in itself is error because it is a jury question and no cause for a *per se* rule that makes a reprimanded employee automatically ineligible for retaliation protection for later complaints. But, worse, the panel completely ignored the numerous complaints to Siegel himself which occurred before, during, and after the expression of concerns about profitability. The panel's decision to ignore this protected conduct remains a puzzle.

One assumes the court of appeals relies on the doctrine that a complaint to the offender himself is not notice to the employing entity. But that doctrine has no application where the harasser owns the company. As CEO and sole shareholder, Siegel is "within that class of an employer organization's officials who may be treated as the organization's proxy." Faragher v. City of Boca Raton, 524 U.S. 775, 789 (1998); see also, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758 (1998) (employer is liable "where the agent's high rank in the company makes him or her the employer's alter ego").

The acts of Siegel to an employee *are* the acts of the company, so there can be no issue of notice to the company. When Siegel fires an employee for telling him to keep his hands off her, that is, in itself, actionable retaliation. There is no need to put the complaint through other channels. That is usually futile. Indeed, an oft-quoted passage in this case involves Myers telling the company's head of human resources about the ways Siegel stepped over the line with his comments and actions, only to be told, "What can you do, he is the President."

Rejection of this Court's holdings on corporate alter-egos in sexual harassment cases may be an emerging trend in the Eleventh Circuit. In Dearth v. Collins, 441 F.3d 931, 935-936 (11th Cir. 2006), that court went so far as to apply the Faragher/Ellerth affirmative defense to harassment by the president and sole shareholder of the employer despite this Court's holding in those very cases that that defense could not apply in such a circumstance -- a holding the court of appeals itself had previously noted in passing. Dees v. Johnson Controls World Services, Inc., 168 F.3d 417, 421-22 (11th Cir. 1999).

At least two circuits follow this Court's guidance from Faragher/Ellerth on the alter-ego issue. Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1232 (10th Cir. 2000) (*quoting* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 756 (1998)). In Mallinson, the harasser was a senior vice president, who reported to the president, who in turn reported to the board of directors. Id. at 1233. Thus, this was "one of those rare cases in which an alter ego instruction was appropriate based on [the harasser's] high rank." Id. at 1232. Johnson v. West, 218 F.3d 725, 730 (7th Cir.2000), citing and applying this Court's holdings quoted above, reached the same conclusion. Other circuits have been following this approach even before Faragher/Ellerth. Torres v. Pisano, 116 F.3d 625, 635 n.11 (2d Cir. 1997); Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983).

The departure of the Court of Appeals for the Eleventh Circuit from this Court's holding and its apparent split with the other circuits militates in favor of a grant of certiorari.

III. A Jury Question Arises Where Evidence Exists That An Employer's Excuse For A Firing Is A Lie, Even Where The Excuse, If Sincere, Would Be A Legitimate One

The court of appeals erred in presuming the spa's lack of profitability in its start up year motivated Siegel to fire Myers. The lack of profitability is itself not a lie. But the mistake of the court of appeals is in assuming that because lack of profitability is not a lie, lack of profitability must be irrebuttable when Respondents offer it as an excuse for firing Myers. The court assumed that, if a fact is undisputed, the court must accept the employer's claim that this fact alone motivated him to fire an employee. This is at best, a naive view of pretext. Experience shows that a more believable pretext is made from an actual fact than from a falsehood. It is better to say one fired an employee because the sun rose in the east than to say the firing was because the sun rose in the west, though the true statement may be no less a pretext than the false one.

The company claimed Siegel fired Myers because the spa was unprofitable in its first year of operation. Myers contends that is a lie. The court of appeals weighed evidence and made this important credibility determination: "There is no question that the spa's profitability was a primary concern of CFI management and that they questioned Myers' ability to run the operation." Appendix, 14a. But that says nothing about the motivation to fire Myers.

Myers offered proof more than sufficient to create a triable issue of fact that Siegel never cared much if

the spa was profitable or not. Siegel pointed out that the spa was a "speck of sand" in his vast financial holdings. Siegel's desire to have sex with Myers, however, was not small, certainly no speck of sand, but a major obsession.

Siegel sabotaged the spa's chance of profitability while using the lack of profitability as a means of increasing his power over Myers and preserving a reason to summon her into his presence, ostensibly to talk about profitability, but really to further his sexual designs on her. From the beginning, Siegel knew the spa would not and could not be profitable in the start-up phase and never honestly thought it could. The profitability pretext was a means of securing contact with and control over Myers.

Siegel put obstacles in the path of profitability and created uncertainty and instability by refusing to set goals or provide a budget. This was a campaign to make Myers more pliable and dependent on Siegel. His conduct in the spa period was a one-year stretch in a five-year campaign to get Myers to succumb to his sexual advances.

On November 15, 1999, near the spa's inception, Myers asked Siegel to tell her what he expected from her and the spa. She asked for an outline of who was to get discounts. She asked for a realistic date for when he wanted the spa to make money. Once again, she told Siegel that he was asking her to operate the spa as a profit center rather than a spa amenity, but he was denying her the tools to market the spa as a profitable entity. That was exactly the Catch-22 Siegel wanted to create to bring Myers under control.

The panel overlooked this in finding, "Myers failed to offer evidence rebutting CFI's evidence that she was terminated because of the spa's lack of profitability." Appendix, 8a. This is simply wrong. Myers offered ample evidence, as shown above and below.

If Siegel had been serious about the spa's profitability he would not have allowed Myers' male successor to remain for two additional unprofitable years with no discipline of any sort, let alone a firing. Myers' year was the start-up year where profit is least likely.

Marketing to the community where a stable base of repeat business could be built would create profit but Siegel would not allow it. He restricted marketing efforts to time-share owners -- a customer base that visits the Orlando area infrequently.

Over Myers' objections, Siegel insisted on a system of 25 % and 50% discounts for most of the spa's target customers -- timeshare owners and many employees of Siegel's group of companies -- with some services actually free. This guaranteed a loss on many if not most services the spa performed for those customers.

Siegel fired Myers in December, 2000, just a few weeks after telling her she did not need a contract because he was not going to fire her. Siegel received regular financial reports. He knew Myers had turned the spa around even in its first year. The spa had three profitable months in 2000, including the month before and the month during which Myers was fired, November and December. Siegel fired Myers just as she produced the profits he said he wanted.

This undercuts both the profitability pretext and the panel's improper reliance on the inference drawn for the moving party that the firing had been building up for a long time.

If the firing were about profitability, one might assume Siegel would have sat down with Myers and allowed her notice and a graceful exit with a "resignation" after being a friend, confidante, and loyal employee for fourteen years. Instead, Myers got a humiliating, bum's rush escort from the building, followed by Respondents' pursuit into her private life in an effort to destroy her with investigations and retaliatory frivolous lawsuits. Common sense tells us this is the work of a spurned suitor, not a disappointed employer. A reasonable jury could so find.

After the firing, the company offered a number of alternative excuses for the firing, excuses not used in the summary judgment motion -- serving wine on company property, lying down with a migraine, having an employee clean Siegel's condo where Myers was staying during renovations of her own place, mismanagement allegations made by a person named Sandra Duran, and a few others. The record shows Siegel himself giving contradictory testimony at two different times on the reasons. The shifting explanations for the firing -- even standing alone -- are evidence enough of pretext to get past summary judgment and on to a jury, even under the circuit's prior precedent. Howard v. BP Oil Co., Inc., 32 F.3d 520, 526 (11th Cir. 1994), *citing* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The panel says there is no support for Myers' belief that her engagement pushed Siegel over the edge to fire her. There actually is some evidence in the statement by the chief operating officer that Myers' relationship with her fiancé was, to Siegel, waving a red flag in front of a bull. But more importantly, the court of appeals overlooked that Myers need not prove that her engagement motivated her firing. It is only necessary for her to present evidence enough to cause the jury to disbelieve Siegel's story. That disbelief alone allows the jury to infer intentional discrimination in the firing, especially when accompanied by this much other evidence. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000). Indeed, juror disbelief with other evidence will not just defeat summary judgment but sustain a verdict. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.").

Petitioner made a strong circumstantial case that the profitability excuse is pretext and that a jury, not a judge, should decide whom to believe. The reason this Court created a circumstantial evidence model of proof is that direct evidence is so rare in these cases. Petitioner presented all the proof of pretext contained in the paragraphs above to the district court and the court of appeals panel, yet the panel, instead of showing where this proof of pretext falls short, merely misstated the record, saying Myers "failed to offer evidence rebutting CFI's evidence that she was terminated because of the spa's lack of profitability."

Indeed, CFI offered nothing but a bare assertion of that as a reason. To be sure, that is all they needed to do in the circumstantial evidence model, but there is no fairness in deeming Myers' extensive circumstantial case of pretext to be non-existent. There is no reason to treat the profitability pretext as irrebuttable. On summary judgment, the court must "disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves v. Sanderson Plumbing, 530 U.S. 133, 135 (2000). The jury is not required to believe the story about profitability where so many powerful facts show it to be a lie. This pretext issue belongs in front of a jury.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-13974-BB

[Filed August 6, 2007]

DAWN GEORGETTE MYERS Plaintiff-Appellant,	)
versus	)
CENTRAL FLORIDA INVESTMENTS, INC., DAVID SIEGEL, WESTGATE RESORTS, INC., WESTGATE RESORTS LTD, CFI SALES AID MARKETING, LTD, Defendants-Appellees.	)

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: CARNES and WILSON, Circuit Judges, and WALTER,* District. Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested. that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

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* Honorable Donald E. Walter, United States District Judge for the Western District of Louisiana, sitting by designation.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-13974
District Court Docket No.
04-01542-CV-ORL-28-DAB

[Filed June 11, 2007]

DAWN GEORGETTE MYERS
Plaintiff-Appellant,

versus

CENTRAL FLORIDA INVESTMENTS, INC.,
DAVID SIEGEL,
WESTGATE RESORTS, INC.,
WESTGATE RESORTS LTD,
CFI SALES AID MARKETING, LTD,
Defendants-Appellees.

WESTGATE LAKES, INC., et al.,
Defendants.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: June 11, 2007
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-13974
D.C. Docket No. 04-01542-CV-ORL-28-DAB

DAWN GEORGETTE MYERS
Plaintiff-Appellant,

versus

CENTRAL FLORIDA INVESTMENTS, INC.,
DAVID SIEGEL,
WESTGATE RESORTS, INC.,
WESTGATE RESORTS LTD,
CFI SALES AID MARKETING, LTD,
Defendants-Appellees.

WESTGATE LAKES, INC., et al.,
Defendants.

Appeal from the United States District Court
for the Middle District of Florida

(JUNE 11, 2007)

Before CARNES and WILSON, Circuit Judges, and WALTER,* District Judge.

PER CURIAM:

Dawn Georgette Myers sued Central Florida Investments, Inc. and its various subsidiary companies (collectively CFI), claiming that she was sexually harassed by CFI's president and CEO, David Siegel, and ultimately fired for rejecting his advances. CFI develops, manages and sells resort timeshares in Orlando, Florida, and during her employment with the company, Myers served as executive director of a new spa at one of CFI's resorts.

The district court dismissed three of Myers' claims[1] and then granted summary judgment to CFI on her remaining claims of sexual harassment and retaliation, which asserted a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and the Florida Civil Rights Act of 1992 (FCRA), Fla. Stat. §§ 509.092, 760.01-.11. The court also remanded

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* Honorable Donald E. Walter, United States District Judge for the Western District of Louisiana, sitting by designation.

[1] The other three counts that had already been dismissed raised claims of retaliation under the Florida Private Whistleblower Act, inducement to prostitution, and negligent retention and supervision.

her state law claims of battery and false imprisonment to state court.[2] Myers now appeals the district court's grant of summary judgment as well as its denial of her third motion to compel discovery.

The FCRA claims stand or fall with the Title VII claims, so our analysis focuses on the federal allegations. *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998). Our review of the district court's grant of summary judgment is *de novo*, and we are to "view all the evidence, and make all reasonable factual inferences, in the light most favorable to the nonmoving party." *Knight v. Baptist Hosp. of Miami. Inc.*, 330 F.3d 1313, 1316 (11th Cir. 2003). Additionally, we review the district court's decision to grant or deny Myers' motion to compel discovery for abuse of discretion. *R.M.R. v. Muscogee County Sch. Dist.*, 165 F.3d 812, 816 (11th Cir. 1999).

I.

First, we will consider Myers' sexual harassment claim. We have made clear that "[t]o prove sexual harassment under Title VII, a plaintiff must show (1) that she belongs to a protected group; (2) that she has been subjected to unwelcome sexual harassment; (3) that the harassment was based on her sex; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and

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[2] In light of our determination that Myers' FCRA and Title VII sexual harassment claims survive summary judgment, her state-law battery and false imprisonment claims should be reinstated.

create a discriminatorily abusive working environment; and (5) that a basis for holding the employer liable exists." *Hulsey v. Pride Rests., LLC*, 367 F.3d 1238, 1244 (11th Cir. 2004). The district court found that Myers established the first three factors but failed to prove the fourth. Accordingly, the court did not address the fifth factor. So our review now centers on the fourth factor—Myers' ability to show the alleged harassment was sufficiently severe or pervasive. In attempting to establish this claim, there are two theories of harassment that a plaintiff can assert, and Myers asserts both. She contends that she suffered sexual harassment under both the tangible employment action theory and the hostile environment theory. We consider each in turn.

To sustain a sexual harassment claim under the tangible employment action theory, Myers must show that her refusal of Siegel's advances resulted in a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 2268 (1998). There is no question that her termination constituted a "tangible employment action," but in order to sustain the claim she must show that she was terminated because she refused Siegel's sexual demands. *Hulsey*, 367 F.3d at 1245.

After reviewing the evidence in the light most favorable to Myers, we agree with the district court's determination that Myers failed to sufficiently link her termination to her relationship with Siegel. Under her version of the facts, she kept Siegel at bay for a full

five years, receiving multiple promotions and pay raises during that time. Although she claims that Siegel's attitude toward her changed when she became engaged to another man, she offers no evidence that Siegel was even aware of the engagement. Furthermore, Myers certainly knew that the CFI executives were unhappy with the spa's performance and were holding her responsible. Myers failed to offer evidence rebutting CFI's evidence that she was terminated because of the spa's lack of profitability. *See Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1312-13 (11th Cir. 2001) (affirming grant of summary judgment on tangible employment sexual harassment theory because there was "unrebutted evidence showing that [the plaintiff] was denied the promotion . . . on grounds independent of the alleged harassment"). Because Myers could not establish a connection between her termination and her rejection of Siegel, her sexual harassment claim cannot survive summary judgement on the tangible employment action theory.

Nevertheless, although we reject the tangible employment action theory, we find that Myers did present sufficient evidence to create a genuine issue of material fact as to whether she experienced a hostile work environment at CFI. The district court found that Myers was unable to show that the harassment she suffered was both objectively and subjectively severe or pervasive. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22, 114 S. Ct. 367, 370 (1993) (noting that a plaintiff must demonstrate both that a reasonable person would have found the environment to be hostile and that she herself subjectively viewed the environment as abusive). We disagree. If we read the

evidence, as we must, in the light most favorable to Myers, it is clear from the record that she has alleged events sufficient to show both a subjective perception and an objective basis for a hostile work environment at CFI.

As to the subjective prong, Myers has set forth evidence from which a reasonable factfinder could determine that she personally felt harassed while working at CFI. Chief among the evidence offered was her own deposition testimony to that effect. She claimed that Siegel's conduct "mortified" and "embarrassed" her on multiple occasions, and the district court's order notes that she was "uncomfortable" with Siegel's conduct and asked him to stop.

Specifically, Myers testified that she asked Siegel to dispel rumors that they were a couple, but he refused, reveling in the gossip around the company. He gave her roses at work on several occasions, and she was "mortified" that she had to leave the office with them for everyone to see. At a company banquet, when Siegel introduced her to the audience, he told everyone that although she was not his date, he wished she were and had asked her but been turned down. Again, Myers claimed she was mortified and humiliated in front of her colleagues by this conduct. Myers also testified that Siegel goaded her into serenading him on stage at a CFI costume benefit and then simulated an erection under the napkin she had placed on his lap. Although no one else testified to seeing the improper hand gesture, two CFI employees submitted affidavits testifying that Myers tried to maintain her composure on stage and then left the room crying. Furthermore,

Myers claims that Siegel promised her money and gifts if she would date him, at one point giving her an unexplained $10,000 check. She also alleges that Siegel publically offered her and her boyfriend $1 million on several occasions for one night with her.

Accordingly, there is sufficient record evidence, for the purposes of overcoming the summary judgment hurdle, to permit a jury to find that Myers subjectively perceived an abusive working environment during the five years in question. Even though there is evidence to the contrary — she continued to seek out Siegel and put herself in compromising positions by traveling with him — Myers still has created a genuine question of material fact about her subjective perception.

Likewise, a reasonable person could have objectively perceived an abusive work environment based on Siegel's conduct toward Myers. The Supreme Court has directed us "to determine whether an environment is sufficiently hostile or abusive by looking at all the circumstances, including [1] the frequency of the discriminatory conduct; [2] its severity; [3] whether it is physically threatening or humiliating, or a mere offensive utterance; and [4] whether it unreasonably interferes with an employee's work performance." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 2283 (1998) (quotations omitted). We are to consider the four factors under a "totality of the circumstances" approach, careful not to fixate on a plaintiffs inability to show a single factor. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1276 (11th Cir. 2002).

Regarding the first factor, Myers' testimony indicates that the harassing conduct was frequent. The court's order states that Myers alleges only ten to twenty touchings, but the court bases that conclusion on the portion of Myers' deposition where she claims that Siegel touched her legs ten to twenty times while they were dining at a specific restaurant. She testified to many more than ten to twenty touchings over the five-year period. In addition to the ten to twenty touchings of her leg that occurred at a particular restaurant, Myers testified that Siegel touched her almost every time she came into a room, acting like she was his girlfriend, putting his arm around her, and slapping her on the butt. She also alleges that he would put his hand on her legs and rub her legs while she was sitting next to him. He would put his arms around her and let his hands fall to her butt. The conduct happened so often that she cannot remember the details of each instance. Myers testified that Siegel kissed her at least three times, ran his hands up her legs while she was performing spa treatments on him on several occasions, and pinned her up against the wall of the spa lobby at least twice.

Regarding the second factor, Myers alleges conduct that was sufficiently severe, when taken in light of its frequency, for a reasonable person to find a hostile work environment. If her testimony is accepted, she was hugged, groped and even kissed, often in public, on multiple occasions while working for CFI. As to the third factor, Myers did not have to feel *physically* threatened by Siegel; humiliation is an equal consideration. *Faragher*, 524 U.S. at 787-88, 118 S. Ct. at 2283 (noting that the conduct can be physically threatening *or* humiliating). There is no question, that

a reasonable person subjected to this kind of unwelcome conduct at work would feel humiliated.

Finally, as to the fourth factor, "[t]he Supreme Court has cautioned that harassment need not be shown to be so extreme that it produces tangible effects on job performance in order to be actionable. Thus, having established the frequency, severity, and humiliating nature of the conduct, [the plaintiffs] failure to establish convincingly how [the employer's] conduct interfered with his duties is not fatal to his hostile environment claim, given the totality of the circumstances." *Miller*, 277 F.3d at 1277. Even so, a jury reasonably could infer that Siegel's open pursuit of Myers made it more difficult for her to perform her job and command the respect of her subordinates at the spa. *See Harris*, 510 U.S. at 25 (Ginsburg, J., concurring) ("It suffices to prove that a reasonable person subjected to the discriminatory conduct would find . . . that the harassment so altered working conditions as to make it more difficult to do the job." (quotation and alteration omitted)).

Therefore, Myers has sufficiently demonstrated both a subjective and an objective perception of hostility sufficient to overcome summary judgment on her hostile work environment theory. For summary judgment purposes she has established the fourth prong of the test — the harassment was severe or pervasive enough to alter the conditions of her employment. Additionally, although the district court did not reach the fifth prong of the test — the existence of a basis for holding the employer liable — Myers has adequately shown, for summary judgment purposes, that CFI was aware of her allegations of harassment

and failed to take action. *See Miller*, 277 F.3d at 1278-79 (noting that "[i]n order to establish a basis for holding [an employer] liable for a hostile work environment, [the plaintiff] must show that [the employer] had notice of the alleged harassment and failed to take immediate and appropriate corrective action"). Myers, therefore, is entitled to a jury determination on her federal and FCRA sexual harassment claims, and the district court's grant of summary judgment was improper.

II.

As to Myers' retaliation claim, the district court properly concluded that she failed to offer evidence supporting a causal connection between any protected activity and her termination. *Stavropoulous v. Firestone*, 361 F.3d 610, 616 (11th Cir. 2004).[3] Her "formal" complaints to management did not occur until after meetings regarding the spa's lack of profitability. And, as the district court noted, even if Myers did establish a prima facie retaliation case, CFI has met its burden of offering a legitimate, nondiscriminatory reason for her termination under the applicable *McDonnell-Douglas* burden-shifting framework.

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[3] As to Myers' post-termination retaliation claim, we find that her claim fails because she cannot show that Siegel's decision to file an unrelated lawsuit against her was an action that "would have been materially adverse to a reasonable employee or job applicant," such that "that the employer's actions [were] harmful to the point that they could well [have] dissuade[d] a reasonable worker from making or supporting a charge of discrimination," *Burlington N. & Santa Fe Ry. Co. v. White*, 548 — U.S. —, 126 S. Ct. 2405, 2409 (2006).

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 1824 (1973). There is no question that the spa's profitability was a primary concern of CFI management and that they questioned Myers' ability to run the operation. Even if the district court erred in relying on the other proffered reasons for Myers' termination (allegations of employee misconduct and complaints filed against Myers), any such error was harmless because the spa's loss of money was a sufficient nondiscriminatory reason for her termination. Just as her tangible employment action theory of sexual harassment fails, Myers cannot sustain a viable retaliation claim.

III.

Finally, we find that the district court did not abuse its discretion in denying Myers' third motion to compel. Our review here is highly deferential, and "we will not second-guess the district court's actions unless they reflect a 'clear error of judgment.'" *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 837 (11th Cir. 2006) (quoting *United States v. Kelly*, 888 F.2d 732,745 (11th Cir. 1989)). There was no such "clear error" here in refusing to grant a motion to compel filed eighty- eight days after discovery had closed.

AFFIRMED in part VACATED in part and REMANDED.

A True Copy - Attested
Clerk U.S. Court of Appeals
Eleventh Circuit

By:/s/ _____
Deputy Clerk
Atlanta, Georgia

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:04-cv-1542-Orl-28DAB

[Filed April 25, 2006]

DAWN GEORGETTE MYERS
Plaintiff,

-vs-

CENTRAL FLORIDA INVESTMENTS, INC.,
CFI SALES AID MARKETING, LTD,
WESTGATE RESORTS, INC.,
WESTGATE RESORTS LTD,
and DAVID SIEGEL,
Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered in favor of Defendants Central Florida Investments, Inc., CFI Sales & Marketing, Ltd., Westgate Resorts, Inc., & Westgate Resorts, Ltd. On Counts I through IV of the Second Amended Complaint & Counts VII & VIII are Remanded to the Circuit Court, Ninth Judicial Circuit, Orange County, Florida.

Date: April 25, 2006

SHERYL L. LOESCH, CLERK
s/I. Cammarota, Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:04-cv-1542-Orl-28DAB

[Filed April 24, 2006]

DAWN GEORGETTE MYERS
Plaintiff,

-vs-

CENTRAL FLORIDA INVESTMENTS, INC.,
CFI SALES AID MARKETING, LTD,
WESTGATE RESORTS, INC.,
WESTGATE RESORTS LTD,
and DAVID SIEGEL,
Defendants.

ORDER

Dawn Georgette Myers ("Ms. Myers") brings the instant action against Central Florida Investments, Inc., CFI Sales and Marketing, Ltd., Westgate Resorts, Inc., and Westgate Resorts, Ltd. (collectively "the corporate Defendants") alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et*

seq. ("Title VII") and the Florida Civil Rights Act of 1992, Sections 509.092, 760.01.11, Florida Statutes ("the FCRA"). Ms. Myers also brings claims of battery and false imprisonment against the corporate Defendants as well as individual Defendant David Siegel ("Mr. Siegel").[1]

This case is currently before the Court on the Defendants' Motion for Summary Judgment (Doc. 93) and Ms. Myers's Response in Opposition (Doc. 102) thereto. Having considered the record, the parties' arguments, and relevant law, the Court concludes that the Defendants' motion must be granted as to Ms. Myers's employment discrimination claims.

I. Background[2]

A. Overview of the Defendants' Business and Ms. Myers's Employment

The Defendants are in the business of developing, managing, and selling interests in timeshare resorts, and they operate several timeshare properties in the Orlando area. Mr. Siegel is the President of, and owns

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[1] *See* Second Am. Compl., Doc. 47 ¶ 8 (setting forth which counts are against which Defendants).

[2] The facts are taken largely from the "Undisputed Facts" submitted by Defendants (Doc. 93), Ms. Myers's Response (Doc. 103) thereto, and Ms. Myers's deposition. Ms. Myers agrees that many of the facts are undisputed, but she disputes others and has provided a "Counter-Statement of Facts" within her Response. (*See* Doc. 103). It is understood that the parties have made these factual stipulations for the purpose of summary judgment only.

one hundred percent of the stock of, Defendant Central Florida Investments, Inc. ("CFI"), and CFI in turn owns subsidiary companies, including Defendants Westgate Resorts, Inc. and Westgate Resorts, Ltd. (Dep. of David Siegel, Pl.'s Ex. D, at 7-8).

In 1986, Ms. Myers, who has a high school education as well as cosmetology and real estate training, got a job doing front-line sales of timeshares at one of Defendants' resorts, Westgate Villas, working for straight commission as an independent contractor. (Dep. of Dawn Georgette Myers, Attach. to Doc. 93, at 32, 39, 41, 45; Undisputed Facts, Doc. 93 at 2 & Doc. 103 at 1). Ms. Myers did not enjoy her front-line sales job and left after about a year. (Myers Dep. at 44, 46). However, a few years later, in 1988 or 1989, Ms. Myers returned to Westgate, doing in-house sales of timeshares at Westgate Villas. (*Id.* at 51, 55).[3]

Ms. Myers remained in her in-house sales position at Westgate Villas for five or six years, and in 1994 or 1995 David Siegel transferred her to another local resort, Westgate Lakes, where she continued to do in-house sales. (*Id.* at 59-60; Undisputed Facts, Doc. 93 at 2 & Doc. 103 at 1). While still working at Westgate Villas, Ms. Myers had ideas about creating a spa at Westgate which she shared with Mr. Siegel. (Myers Dep. at 74, 76). Eventually Mr. Siegel became supportive of the idea of creating a spa at Westgate Lakes. (*Id.* at 77-78). Although Ms. Myers had

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[3] Ms. Myers explained that in-house sales differ from front-line sales in that in-house sales involve sales to existing timeshare owners. (Myers Dep. at 55).

previously worked in a hair salon, she had never worked in a spa and she had no background or experience with spa design or management. (*Id.* at 87).

In January of 1998, Mr. Siegel named Ms. Myers Executive Spa Director of the yet-tobe-built spa – a promotion that came with an increase in pay. (*Id.* at 257). By that time, Ms. Myers's pay structure had already been changed from commission-based to a salary of $1000 per week. (*Id.* at 161). After she stopped selling timeshare and began working solely on the spa, her salary increased over time – from $1000 to $1200 per week, and then to $1500 per week, and finally to $2000 per week. (*Id.* at 162). These increases – that is, the doubling of her salary from $52,000 per year to $104,000 per year – occurred over a twoyear period, from 1998 to 2000. (*Id.* at 162-63).

The spa – named the Papillon Spa – opened in November 1999. (*Id.* at 152-53). Ms. Myers, as the Executive Spa Director, was the direct supervisor of the entire staff of the spa. (*Id.* at 265). On December 13, 2000, – just over a year after the spa had opened for business – the Defendants terminated Ms. Myers's employment. (Undisputed Facts, Doc. 93 at 2 & Doc. 103 at 1).

B. Ms. Myers's Relationship with David Siegel

Ms. Myers met Defendant David Siegel and his second wife, Bettie, while Ms. Myers was working at Westgate Villas doing in-house sales. (Myers Dep. at 66). It is undisputed that Ms. Myers and Mr. Siegel soon became friends and that the friendship never evolved into a romantic relationship. It is also

undisputed that Mr. Siegel, at least for a time, was romantically interested in Ms. Myers and that she did not reciprocate his feelings. (*See, e.g.*, Dep. of David Siegel at 13-15). However, there is dispute regarding Mr. Siegel's treatment of Ms. Myers and whether it constitutes sexual harassment, as well as whether Ms. Myers was terminated from her job for an unlawful, discriminatory reason. Ms. Myers contends that Mr. Siegel was obsessed with her and that she was terminated in retaliation for refusing his advances and for complaining about his harassment. She also claims that his treatment of her created a hostile work environment. Although Mr. Siegel acknowledges having had a romantic interest in Ms. Myers, he denies many of the events alleged by Ms. Myers; however, for purposes of summary judgment the Court must accept Ms. Myers's version of the facts as true.[4]

The first incident which Ms. Myers cites occurred at a Westgate Christmas party in 1995; Mr. Siegel asked Ms. Myers to dance, and while they were dancing he suddenly kissed her. (Myers Dep. at 66-67; Undisputed Facts, Doc. 93 at 8 & Doc. 103 at 5). The next night Mr. Siegel called Ms. Myers at home and apologized for kissing her. (Myers Dep. at 67-68). They became good friends after this dance-floor kiss incident. (Undisputed Facts, Doc. 93 at 8 & Doc. 103 at 5). "Myers and David Siegel began to talk frequently, sometimes daily. The friendship flourished during David Siegel's separation from his wife, Bettie, in 1995." (Undisputed Facts, Doc. 93 at 3 & Doc. 103 at 2) (record citations omitted). Mr. Siegel tried to get Ms. Myers to date him, but Ms.

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[4] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Myers was not interested; because Mr. Siegel had been so kind to her and had given her an opportunity to prove herself, it was very difficult for her to tell Mr. Siegel that she did not want to date him. (Myers Dep. at 92). Ms. Myers told Mr. Siegel that she was sorry, that she wished she felt differently about him, but that there was too much of an age difference between them. (*Id.* at 92-93; *see also* Undisputed Facts, Doc. 93 at 3 & Doc. 103 at 2).

"Myers and Siegel talked about personal matters, as friends do, such as Myers'[s] caring for her mother and Siegel's separation from his wife. Myers gave Siegel her cell phone number." (Undisputed Facts, Doc. 93 at 3 & Doc. 103 at 2) (record citations omitted). "On one occasion, David Siegel visited Myers'[s] Conway area home; she described to him the changes and renovations she would like to make to the house. Shortly thereafter, David Siegel arranged for the renovations to be completed at no cost to Myers. Myers commented, 'wow, there are really great perks to being your friend' and they both laughed." *Id.* (record citations omitted).

The second time[5] – the dance-floor kiss being the first – that Mr. Siegel made what Ms. Myers describes as a sexual advance toward her was in a meeting in Mr. Siegel's office at CFI. (*Id.* at 121). Ms. Myers was wearing a baseball cap, and Mr. Siegel removed the cap and kissed her. (*Id.*). Mr. Siegel also gave her

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[5] Ms. Myers does not provide a date for this incident, but she believes it occurred during a meeting regarding the spa. (Myers Dep. at 121).

yellow roses that day, and Ms. Myers was mortified because she had to walk out of the office with the roses. (*Id.* at 122). Mr. Siegel gave her yellow roses one other time as well, but she does not remember the circumstances. (*Id.* at 179). Ms. Myers understood that "typically, yellow roses mean friendship." (*Id.* at 180).

Early in the friendship, Ms. Myers greeted Mr. Siegel with a hug and a peck on the cheek, as she did her other friends. (*Id.* at 123-24). However, after a while she stopped greeting him that way so as not to "giv[e] him any sort of false hope." (*Id.* at 123). There came a point where Ms. Myers realized "it was no longer [her] friend pursuing [her]" but "was, like, this really angry person who wasn't getting what he wanted pursuing [her] and he treated [her] like crap. He treated [her] badly in front of a lot of different people." (*Id.* at 125). It was at that point that she stopped giving him hugs. (Myers Dep. at 125; *see also* Doc. 93 at 3; Doc. 103 at 2).

Mr. Siegel would often stop by Westgate Lakes while Ms. Myers was still doing inhouse sales there, and a rumor began circulating that Mr. Siegel and Ms. Myers were having an affair. (Myers Dep. at 93). Ms. Myers denied the rumor and defended herself. (*Id.*). Ms. Myers claims that at some point – she could not recall the year – Mr. Siegel gave her an envelope with a check for $10,000 in it while she sat at her sales table. (*Id.* at 94, 96). Ms. Myers was angry about the check and refused to accept it. (*Id.* at 98). Mr. Siegel told her that he was just trying to help her out, and Ms. Myers supposes he thought he was doing a good thing by giving her the check. (*Id.*).

Mr. Siegel started offering things to Ms. Myers a few months after he started pursuing his interest in dating her. (*Id.* at 98). For example, if Ms. Myers said that she liked a Porsche, Mr. Siegel "would say, '[W]ell, you could have that Porsche if you were with me.'" (*Id.* at 99). Mr. Siegel also told Ms. Myers that the two of them were "soul mates" and he gave her a book on "soul mates." (*Id.* at 99, 105-06).

Ms. Myers testified in her deposition that Jim Gissy, the executive vice president of sales and marketing, encouraged her to date Mr. Siegel,[6] but she told Mr. Gissy that she was not interested in dating him because of the age difference but that she "loved him as [her] friend." (*Id.* at 249-50). Ms. Myers described this conversation with Mr. Gissy as one between friends, and she was not angry with Mr. Gissy about it. (*Id.* at 251-52). Ms. Myers has also submitted the declaration of Gail Miller, who worked with Ms.

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[6] In her Counter-Statement of Facts, Ms. Myers, citing her deposition testimony, states that "Siegel asked Jim Gissy to convince Plaintiff to go out with him." (Doc. 103 at 14 ¶ 82). However, Ms. Myers did not testify to this at her deposition, nor is there any other evidence of it; she testified that Jim Gissy tried to convince her to date him, not that David Siegel asked Jim Gissy to convince her to date him. In any event, as noted in the text, there is evidence in the record that Mr. Siegel asked another Westgate employee, Gail Miller, to convince Ms. Myers to date him.

Myers in sales at Westgate;[7] Ms. Miller states that Mr. Siegel asked Ms. Miller several times "to convince Myers to date him." (Decl. of Gail Miller, Pl.'s Ex. C).

In May of 1997, Mr. Siegel called Ms. Myers and asked her if she would accompany him to the Bahamas. (Myers Dep. at 180, 202). Ms. Myers – who had a boyfriend at that time, as she did during most of the timeframe at issue – told Mr. Siegel that she could not go to the Bahamas with him; however, after Mr. Siegel told her he was going to be looking at some property and a spa would possibly be built there, Ms. Myers agreed to go. (*Id.* at 181). They flew to the Bahamas on a private jet with several other gentlemen, and once they arrived Ms. Myers confirmed that she had her own, separate room at the resort property where they were staying. (*Id.* at 181-82, 184). After they had drinks at the bar by the pool, they drove to the potential timeshare site with the other gentlemen and then returned to the resort. (*Id.* at 182, 186). At dinner Mr. Siegel seemed very angry and did not speak to her, treating her "like [she] was just a piece of dirt." (*Id.* at 187). The next day they returned to Orlando. (*Id.* at 191).

Later in May of 1997, Mr. Siegel and Ms. Myers traveled to New York City together. (*Id.* at 202). Ms. Myers was planning to attend a fitness show there, and coincidentally Mr. Siegel called and said he would

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[7] The declaration of Ms. Miller does not provide the dates that Ms. Miller worked at Westgate but states that she worked with Ms. Myers in sales at Westgate Lakes. (Decl. of Gail Miller, Pl.'s Ex. C ¶¶ 3-4).

like to go to New York City for the weekend to see Yanni. (*Id.* at 203-04). They flew there on a commercial airplane, and Ms. Myers did not pay her own way. (*Id.* at 206). On the airplane, Mr. Siegel told her that their accommodations in New York would be a two-room suite; however, Mr. Siegel's secretary had assured her beforehand that there were two separate rooms. (*Id.* at 206-07).

When they arrived at the hotel in New York City, Ms. Myers's "skin started to crawl" "[b]ecause [she was] a young girl with an older gentleman. Everybody was looking at me like here we go, we've seen this before." (*Id.* at 209-10). When they got to the room, Ms. Myers started opening doors looking for a second bedroom. (*Id.* at 210-11). The bellman told her there was only one bedroom. (*Id.* at 211). Ms. Myers went into the bathroom and cried. (*Id.*). Eventually Ms. Myers emerged from the bathroom and "let [Mr. Siegel] have it," telling him that she was disgusted with him and that he knew she would not be comfortable being in the same room with him. (*Id.* at 213). She told him he would not be sleeping in the bedroom, and he sat there with a "Walter Matthau" expression on his face, as if he knew he had been "busted." (*Id.* at 214).

Ms. Myers and Mr. Siegel then went shopping, to dinner, and to a show. (*Id.* at 215-220). Ms. Myers "was miserable" and throughout the dinner looked at him thinking, "I hate you." (*Id.* at 218). However, she "felt bad feeling like that about someone that [she] was grateful to, that had given [her] great opportunity at work, that there were a lot of parts about him that [she] really admired and cared about." (*Id.* at 218-19).

Ms. Myers became upset when a friend of Mr. Siegel's called and wanted them to meet up with him and his mistress. (*Id.* at 221-22). Mr. Siegel returned her to the hotel, and Ms. Myers demanded that he give her her plane ticket. (*Id.* at 222). Ms. Myers flew back to Orlando early the next morning without Mr. Siegel. (*Id.* at 222-23). In his deposition, Mr. Siegel testified, "I assumed we were going to sleep together. When you ask somebody to go on a trip out of town, you assume that you're going to spend day and night together." (Dep. of David Siegel, Pl.'s Ex. D at 22).

Ms. Myers claims that on several occasions Mr. Siegel offered her or her boyfriend a million dollars for a night with her. The first of these incidents occurred in 1995,[8] when Ms. Myers was dating Rick Pierce; Mr. Siegel told Mr. Pierce, in Ms. Myers's presence, that Pierce was "so lucky" and that Mr. Siegel "would give [him] a million dollars to spend one night with her." (Myers Dep. at 335). In response to this comment, Ms. Myers "just looked at him and . . . said, "David." (*Id.* at 337). Then there was a rumor around the company that Mr. Siegel had offered her a million dollars to have sex with him.[9] (*Id.* at 336). Mr. Siegel repeated this million-dollar offer to Pierce at an awards banquet, telling him that he was "one lucky man" and "[j]ust remember, my offer still stands." (*Id.* at 346).

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[8] (*See* Pl.'s Resp. to Def. Westgate Resorts, Ltd.'s First Set of Interrogs., Pl.'s Ex. H at 4).

[9] Mr. Siegel made the same million-dollar offer to a salesman at Westgate regarding the salesman's wife, and there were then rumors around the company about that comment. (Myers Dep. at 341-42).

Mr. Siegel made the offer directly to Ms. Myers at another banquet. (*Id.* at 344). The last mention of the million dollars occurred after the spa had opened and Ms. Myers was giving Mr. Siegel a spa treatment; Ms. Myers commented that she should be compensated for the treatments she provided him, and Mr. Siegel commented that he had already told her how she could make a million dollars. (*Id.* at 345).

In July 1997, Ms. Myers began dating Mr. Siegel's son, Richard. (*Id.* at 113, 238). Ms. Myers and Richard kept their relationship a secret for about three months so as not to upset Mr. Siegel. (*Id.* at 113). During the time that Ms. Myers and Richard Siegel were secretly dating, Ms. Myers accompanied David Siegel, as a friend, to Miami for a bar mitzvah. (*Id.* at 238-40). Ms. Myers explained that she went on this trip because Mr. Siegel "absolutely begged her to" go. (*Id.* at 242). But, she "was David's friend first. He was [her] friend. . . . He was a friend that offended [her] and a friend that disrespected [her] and a friend that, you know, yeah, made [her] angry. But he was also [her] boss." (*Id.* at 242-43). Ms. Myers discussed the issue with Richard Siegel, and they decided that she should go to the bar mitzvah with Mr. Siegel so that he would not get hurt or angry and so that neither Ms. Myers or Richard Siegel would get fired. (*Id.* at 243). Ms. Myers "felt sorry for" Mr. Siegel and "didn't know what to do." (*Id.* at 252).

They traveled to Miami and stayed at a Westgate property; Ms. Myers had her own room. (*Id.* at 239-40). They went to the bar mitzvah and reception, and nothing offensive happened at the reception. (*Id.* at 243). However, after the reception Mr. Siegel asked her

if she would like to take a romantic walk on the beach, and she refused and told him she was there with him as his friend, not his date. (*Id.* at 244). Mr. Siegel got angry and walked away. (*Id.* at 244-45). The next morning, they ate breakfast by the pool and Mr. Siegel "just had that air that he's mad at [Ms. Myers] because [she] didn't walk on the beach." (*Id.* at 246). They returned to Orlando and Ms. Myers went to work on Monday as usual. (*Id.* at 247).

Ms. Myers asked Mr. Siegel to send out an e-mail or memo discrediting the rumor around Westgate that they were having an affair, but he would not. (*Id.* at 232). When Ms. Myers brought the rumor to his attention, he told her that he liked for people to think she was his girlfriend. (*Id.* at 233). However, Ms. Myers acknowledges that during an awards banquet, Mr. Siegel introduced her as the spa director and pointed out that she was not there as his date, even though he would like for her to be; he explained to the crowd that he had asked her but she would not go out with him. (*Id.* at 234-36). Despite her prior requests that Mr. Siegel dispel the rumors, Ms. Myers was mortified by this, claiming that Mr. Siegel humiliated her and made a fool of himself. (*Id.* at 237).

Eventually, Richard Siegel told Mr. Siegel that he and Ms. Myers were dating. (*Id.* at 254). Mr. Siegel called Ms. Myers and told her that he knew about the relationship and that he had told Richard that if Mr. Siegel could not have her, he would want Richard to have her. (*Id.* at 255).

In April 1999, Mr. Siegel – by then divorced from his second wife, Bettie[10] – began dating Jackie Mallory. (*Id.* at 262). Ms. Myers claims that Ms. Mallory made sexual advances toward her on several occasions. For example, during a party in May 1999, Jackie Mallory made comments about Ms. Myers's breasts and kissed her on the lips when saying goodnight. (*Id.* at 282). Additionally, at a December 1999 wine-tasting event that Ms. Myers attended with Richard Siegel, David Siegel, and Jackie Mallory, Jackie Mallory whispered for Ms. Myers to ask David Siegel why he was smiling, and she did so. (*Id.* at 305-06). Mr. Siegel did not say anything, but Jackie Mallory then said, "I asked [David] what would his fantasy be, and his fantasy was to have the two of us together." (*Id.* at 306). Ms. Myers was sickened and thought to herself at the time, "I need out of this crazy family." (*Id.*). Later that evening in the parking lot, Ms. Myers broke up with Richard Siegel, but a couple of months later they began dating again. (*Id.* at 307-08). Mallory repeated the suggestion of a ménage à trois on other occasions, including during David Siegel's spa treatments after the spa had opened. (*See* Pl.'s Ex. H at 2). On January 2, 2000, David Siegel and Jackie Mallory got married. (Myers Dep. at 309).

Another incident during which Ms. Myers claims Mr. Siegel acted inappropriately occurred in November 1999 at a United Way benefit where Westgate employees dressed up as celebrities. (*Id.* at 287-88). Ms. Myers, who was still dating Richard Siegel at that time, attended the benefit dressed as Marilyn Monroe.

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[10] *See* Dep. of David Siegel at 5.

(*Id.* at 289). During the event, Mr. Siegel asked Ms. Myers – as Marilyn Monroe – to sing to him because he was "the president." (*Id.* at 290). Ms. Myers was reluctant to sing, but Mr. Siegel then solicited bids from the crowd, for charity, to get Ms. Myers to sing. (*Id.*). After someone in the crowd bid $500, Ms. Myers went up on the stage and sang "Happy Birthday" to Mr. Siegel, mimicking Marilyn Monroe's breathy voice as best she could. (*Id.* at 291-92, 295-96). Mr. Siegel asked her to sit on his lap while she sang, and she did. (*Id.* at 294, 296-97). Ms. Myers grabbed a napkin and put it on Mr. Siegel's lap before she sat down so that she "wasn't sitting directly on his lap." (*Id.* at 296-97). When Ms. Myers put the napkin on Mr. Siegel's lap, Mr. Siegel put his hand under the napkin and simulated an erection. (*Id.* at 299-300). Ms. Myers does not know if anyone else saw this. (*Id.* at 300).

When Ms. Myers was finished singing, she "rushed off the stage and started crying." (*Id.* at 297). Ms. Myers claims that she had no choice but to sing and that she was "just being a sport." (*Id.* at 298). Ms. Myers was mortified because people already thought the two of them were having an affair, and Mr. Siegel put her in a situation where they looked like John F. Kennedy and Marilyn Monroe. (*Id.* at 301). By this time, she had been dating Richard Siegel for over two years. (*Id.*). However, there was still a rumor going around that she and Mr. Siegel were having an affair, meaning that people thought she was dating both father and son at the same time. (*Id.*).

Sometime in the Spring of 2000, Ms. Myers again broke up with Richard Siegel. (*Id.* at 316). Just after the breakup, she and David Siegel made an agreement

about renovations to her home. (*Id.* at 322). Ms. Myers moved into a condominium at Bay Hill that Mr. Siegel owned while her own condominium was being renovated. (*Id.* at 324). She did not pay rent for Mr. Siegel's condominium. (*Id.* at 325). In April 2000, approximately four weeks after she broke up with Richard Siegel, Ms. Myers began dating a real estate agent named Cleve Loveland. (*Id.* at 324).

Ms. Myers testified in her deposition that during her employment Mr. Siegel would put his hand on her leg and rub her legs while she was sitting next to him, would put his arm around her and let his hand drop to her butt, and on one occasion after the spa had opened he slapped her butt as she was walking into her office. (*Id.* at 352-56). Mr. Siegel also ran his hands up her legs to her butt during spa treatments. From 1995 to 2000, Mr. Siegel touched her legs or butt a total of more than ten but less than twenty times. (*Id.* at 352-53). Ms. Myers also claims that after the spa opened Mr. Siegel would drop his towel before getting into the shower instead of following her instructions to remain fully draped until he got to the shower; she does not quantify how many times this occurred. (Decl. of Georgette Myers, Pl.'s Ex. O).

Ms. Myers also complains that Mr. Siegel glared at her and yelled at her and showed her no respect. However, Ms. Myers acknowledged that she was not the only target of occasional screaming and yelling; "[h]e screams and yells at everybody." (Myers Dep. at 128-29). In fact, "Mr. Siegel daily would scream and yell at everyone if he was in a bad mood." (*Id.* at 129; *see also* Undisputed Facts, Doc. 93 at 3-4 & Doc. 103 at 2 ("But at times, Myers angered Siegel, who then

'treated me [Myers] like crap' in front of others. But, as Myers readily acknowledged [in her deposition], she 'was not targeted and Siegel's bad moods were visited on everyone.' Nor were Siegel's rejections of Myers'[s] business requests targeted; Siegel said no to everyone.")).[11] Other Westgate executives were also disrespectful to Ms. Myers; it "appears to be part of the corporate culture at Westgate." (Myers Dep. at 159-60). She has witnessed Mr. Siegel yell at everybody, and she has heard Mr. Siegel's brother, Barry Siegel, yell; "they all have acted extremely unprofessional." (*Id.* at 160).

C. The Development of the Spa and Ms. Myers's Termination

"Myers first envisioned a spa at a Westgate resort while working part time at an Orlando area spa facility in 1994 or 1995, [while she was also] selling timeshare interests for Westgate. Myers proposed the idea to Siegel. By this time, Myers and Siegel were confirmed friends. Myers well knew that Siegel was 'all about dollars,' so Myers knew that the spa she envisioned must make money for Westgate. So[,] she emphasized the financial rewards, both directly and indirectly, of having a spa at one of Westgate's resorts. The idea floated around for about a year. Siegel then

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[11] In her Response to Defendants' Statement of Facts (Doc. 103), Ms. Myers expressly disputes some facts, agrees that some are undisputed, and fails to address others. Where she fails to expressly dispute a fact, the Court construes her silence as a lack of dispute; indeed, the facts are taken from her deposition testimony.

told Myers that a spa would be built at Westgate Lakes Resort . . . . Since Myers had no background or experience designing or managing a spa, for the next year, she researched spa design and management." (Undisputed Facts, Doc. 93 at 4-5 & Doc. 103 at 3) (record citations omitted).

"Although Myers selected the Spa's name and pioneered the project, Westgate hired Trisha Eckoff for the interior design of the spa. While Myers and Ms. Eckoff worked together, Myers concluded that she and Ms. Eckoff had very different visions for the spa. Ms. Eckoff sought to oversee the project, which angered Myers who thought she had been tasked with overseeing the spa project in its entirety. Because of frequent disagreements between Myers and Eckoff, Myers asked Siegel to exclude Eckoff, which he did." (Undisputed Facts, Doc. 93 at 4-5 & Doc. 103 at 3) (record citations omitted) (emphasis removed). Despite the disagreements with Mr. Siegel and Trisha Eckoff, Ms. Myers was still able to "deliver the spa that [she] wanted to deliver"; the spa opened in November 1999. (Myers Dep. at 152-53). She was able to complete her tasks and get the spa built. (*Id.* at 157).

Although Mr. Siegel supported the idea of the spa, other Westgate employees – including Mr. Siegel's brother, Barry Siegel, and Mr. Siegel's son, Steve Siegel – were not supportive, and, according to Myers, "a war started" when they found out about the spa. (*Id.* at 83). Ms. Myers "had to fight for the spa, and the only person who supported [her] was David" Siegel. (*Id.*; *see also* Undisputed Facts, Doc. 93 at 4-5 & Doc. 103 at 3 ("But not all Westgate executives were as supportive of the spa as Siegel. Barry Siegel, for

instance, was vocal in his opposition and tried, unsuccessfully, to undermine [Ms. Myers]. He failed. David Siegel remained steadfast in his support of Myers and her vision of the spa.") (record citations omitted)).[12]

According to Ms. Myers, "David Siegel knew nothing about the spa business. Trisha Eckoff knew nothing about the spa business. Mark Waltrip knew nothing about the spa business. No one in that company – I'm not saying in the world – I'm saying in that timeshare development company knew anything about the spa business other than myself at that particular time." (Myers Dep. at 146). Therefore, "it was imperative that they ask" Ms. Myers what she needed to make the treatment rooms functional. (*Id.*).

When Ms. Myers was the spa director, she reported to the general manager of Westgate Lakes, Bob Normington. (Waltrip Dep. at 9). Normington reported to the director of resort operation, Paul Bosch, and Bosch in turn reported to Mark Waltrip, who reported to David Siegel. (*Id.* at 10). "Myers and Mark Waltrip disagreed about many aspects of the Spa. Myers portrayed Waltrip as an opportunist, getting involved with a project at its late stages and then taking credit for its success. But Myers defied Waltrip; things were

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[12] Ms. Myers has stipulated to the statement quoted in the text that Mr. Siegel "remained steadfast in his support of Myers and her vision of the spa," but she also testified in her deposition that at one point during the construction of the spa, Mr. Siegel told Ms. Myers that the spa was not important to him, that it was just "a speck of sand in [his] world" and he did not want to be bothered with it. (Myers Dep. at 263).

going to be done her way. There was an exception; over Myers['s] objections, Waltrip authorized fabrication of the steam rooms without proper specifications. After the spa opened, the spa was flooded. The leakage resulted from the faulty fabrication of the steam rooms. Myers told Siegel that Waltrip was responsible, for which Waltrip got 'called on the carpet.' From that point on, Myers became a target for Waltrip and his reputation of eliminating people who sidestep him and develop a direct relationship with Siegel." (Undisputed Facts, Doc. 93 at 7 & Doc. 103 at 4). Other people also have been made targets by Mark Waltrip. (Myers Dep. at 270).

"Well before the Spa opened, Myers knew that Siegel expected, even demanded, that the Spa be profitable." (Undisputed Facts, Doc. 93 at 6 & Doc. 103 at 3). However, the spa was not profitable at first and Mr. Siegel and Mr. Waltrip discussed profitability with Ms. Myers. (*See id.*)

Sometime prior to November 2000, Mark Waltrip called Ms. Myers to his office for a meeting. (*Id.* at 329). Mr. Waltrip "started right in on [her] about the spa not being profitable." (*Id.* at 330). She tried to explain her view of why it was not profitable, but Mr. Waltrip criticized her management skills and told her that she would be better off just designing spas for the company rather than managing them. (*Id.* at 331). Ms. Myers told Mr. Waltrip that her agreement with Mr. Siegel was that as the spas expanded to more resorts she would make more money and that she was not going to take on additional design responsibility without more pay. (*Id.*). Mr. Waltrip suggested to her that it was "a little ridiculous" for a spa director to

make an annual salary of $104,000, but Ms. Myers responded that he "obviously [had not] done [his] research very well." (*Id.* at 332).

Ms. Myers told Mr. Waltrip that if Mr. Siegel agreed to cut her salary then "it's not about anything other than it's personal." (*Id.*). She started to cry and said, "This isn't fair. This is obviously because I'm in love with Cleve [Loveland] and we're talking about getting married, and you know, this isn't right." (*Id.* at 332-33). Mr. Waltrip then told her that she was antagonizing Mr. Siegel, saying that she knew how Mr. Siegel felt about her and it was "like waving a red flag in front of a bull" for her to sponsor a golf tournament with Cleve Loveland. (*Id.* at 333).

Ms. Myers did not have a written employment agreement. (*Id.* at 360). In approximately November 2000, she told Mr. Siegel, "Something crazy's going on. I do not trust Mark Waltrip." (*Id.*). She asked Mr. Siegel for an employment contract – "something in writing saying that [she is] protected" – but he refused to give her a contract and told her that his word was her contract. (*Id.* at 360-61). By that time, Ms. Myers had repeatedly been yelled at about the profitability of the spa, but no one ever sat her down and talked specifically about profitability. (*Id.* at 362). The spa was showing a loss overall at that time. (*Id.*).

In late November or early December 2000, the lead massage therapist at the spa since its inception, Bill

Toth,[13] attempted to turn in his resignation to Bob Normington because Toth was "very unhappy there and was not being treated with great respect." (Toth Dep at 16-17). Ms. Myers was insulting to him; was absent from the spa a lot; and had a "very demeaning" attitude, acting like Toth had no understanding at all of the spa industry. (*Id.* at 17-18). Additionally, when Ms. Myers and Richard Siegel broke up, Ms. Myers "was very emotional and did not come to the spa for quite awhile." (*Id.* at 21). Ms. Myers then asked the spa employees to "sign a card apologizing for making her work so much and taking her time away from" Richard Siegel. (*Id.*). Ms. Myers also told the spa employees that they were required to provide one free spa service per week – for example, to Ms. Myers's boyfriend, Cleve Loveland. (*Id.* at 22). One time Ms. Myers came in intoxicated and not feeling well; they had her lie down and sleep on a massage table in a treatment room. (*Id.* at 32). A few times, Ms. Myers drank wine on the job and gave wine to others, including him. (*Id.* at 33). On occasion, Ms. Myers took naps at the spa. (*Id.* at 40). Toth also reported that she openly gossiped about other employees, especially David and Jackie Siegel. (*Id.* at 41). Ms. Myers also sent a spa employee to clean her home during business hours. (*Id.* at 39).

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[13] Toth now works as the associate director of the Canyon Ranch Spa at Gaylord Palms Resort in Kissimmee. (Toth Dep. at 7, 9). As noted by Ms. Myers in her opposition memorandum, "'[t]he court should give credence to . . . evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" (Doc. 102 at 3) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000)). Toth is a disinterested witness.

Toth also talked to Mark Waltrip either the same day of the next day; Waltrip "was very proactive on the situation." (*Id.* at 35). After Toth's attempted resignation, an investigation was conducted and other spa employees were asked to provide statements. Mark Waltrip testified in his deposition that after he talked to Toth and learned of the low morale of the spa staff, Waltrip called David Siegel and told him there was an issue about the spa; Mr. Siegel assumed that Waltrip was referring to profitability, but Waltrip told him of Toth's allegations and recommended immediate suspension and an investigation. (Waltrip Dep. at 30). Mr. Siegel agreed, so Ms. Myers was suspended and an investigation was conducted. (*Id.*). A team from human resources and security conducted an investigation, and the spa employees were interviewed. (*Id.* at 31). According to Waltrip, "a substantial number" of the spa employees supported Toth's allegations. (*Id.*). There was corroboration of Ms. Myers being hung over, sleeping in a treatment room, drinking on the job, and using employees for personal tasks. (*Id.*; *see also* Dep. of Kelly Mazzarella).

After the investigation, the next step was discussed during a telephone meeting of Waltrip, David Siegel, Gary Pearce of human resources, and corporate counsel. (Waltrip Dep. at 31). They decided to interview Ms. Myers and agreed that if she admitted to the allegations they would terminate her. (*Id.*). Ms. Myers was interviewed and admitted to most of the

allegations,[14] and she was terminated. (*Id.* at 31-32). According to Waltrip, ultimately it was David Siegel's decision to terminate Ms. Myers, but everyone in the meeting agreed that she should be terminated. (*Id.* at 32). Ms. Myers was terminated on December 13, 2000.

After Ms. Myers was terminated, evidence of financial misconduct by Ms. Myers came to light. (*Id.*). A vendor came around seeking payment for a bed that Ms. Myers had bartered. (*Id.*). Apparently a furniture salesman was looking for spa gift certificates that Ms. Myers had promised him in exchange for a bed for her personal home. (*Id.* at 35; *see also* Toth Dep. at 51).

D. Procedural Background

In her Second Amended Complaint (Doc. 47), Ms. Myers alleges nine counts, six of which remain[15]: sex

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[14] In her opposition papers, Ms. Myers contests some but not all of the allegations regarding improper conduct at the spa. She admits to lying down in the treatment rooms but attributes the need to do so to recurring migraine headaches. In a declaration submitted by Ms. Myers in opposition to the summary judgment motion, former spa employee Kelly Oehrle states, "I cleaned the house Georgette was staying in (Siegel's condo) on Fridays for several weeks. . . . I had been having financial difficulties and Myers looked out for me by sending me to do the job when I would otherwise have been sent home without pay." (Decl. of Kelly Oehrle, Pl.'s Ex. B at 2 ¶¶ 29-30).

[15] The other three counts – retaliation under the Florida Private Whistleblower Act (Count V), inducement to prostitution (Count VI), and negligent retention and supervision (Count IX) – have been dismissed. (*See* Docs. 63 & 76).

discrimination and harassment under Title VII (Count I); retaliation under Title VII (Count II); sex discrimination and harassment under the FCRA (Count III); retaliation under the FCRA (Count IV); battery under Florida law (Count VII); and false imprisonment under Florida law (Count VIII). Defendants' current motion (Doc. 93) seeks summary judgment on all of these remaining counts.

II. Discussion

A. Summary Judgment Standards

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing that no genuine issues of material fact remain. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

When faced with a "properly supported motion for summary judgment, [the nonmoving party] must come forward with specific factual evidence, presenting more than mere allegations." *Gargiulo v. G.M. Sales, Inc.*, 131 F.3d 995, 999 (11th Cir. 1997). "The evidence presented cannot consist of conclusory allegations or legal conclusions." *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991); *see also* Fed. R. Civ. P. 56(e) (providing that nonmovant's response "must set forth specific facts showing that there is a genuine issue for trial").

In ruling on a motion for summary judgment, the Court construes the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). However, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Moreover, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

"Summary judgment may be granted if the non-moving party's evidence is merely colorable or is not *significantly probative." Sawyer v. Southwest Airlines Co.*, 243 F. Supp. 2d 1257, 1262 (D. Kan. 2003) (citing *Anderson*, 477 U.S. at 250-51). "'In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial.' Essentially, the inquiry is 'whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Id.* (quoting *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988) and *Anderson*, 477 U.S. at 251-52); *see also LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366, 1371 (S.D. Fla. 1999) ("The law is clear . . . that suspicion, perception, opinion, and belief cannot be used to defeat a motion for summary judgment."). "[T]he summary judgment rule applies in job discrimination cases just

as in other cases. No thumb is to be placed on either side of the scale." *Chapman v. AI Transp.*, 229 F.3d 1012, 1026 (11th Cir. 2000).

B. The Merits of Defendants' Motion

Before turning to analysis of the Defendants' motion, the Court notes that it is apparent from just a paper record that there is much acrimony between the parties and between counsel in this case. Moreover, both sides have at times engaged in what may be charitably called stretching of the record to suit their purposes, and in assessing the motion papers the Court has taken great care to review the evidence itself rather than the parties' characterizations of it.[16] The

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[16] *Cf. Primas v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 5:04CV342(DF), 2006 WL 839242, at *12-13 (M.D. Ga. Mar. 30, 2006) ("The Court should point out before concluding that its task in considering this motion has been needlessly frustrated by the parties' inability to separate the wheat from the chaff in determining which facts are material to its resolution and which are not. . . . The Court has nevertheless thoroughly examined the evidence presented and concludes that [the plaintiff] has failed to demonstrate a genuine issue of material fact on any of her claims . . . .").

parties and their counsel would do well in the future to avoid unnecessary sniping.[17]

The Defendants make several arguments in their summary judgment motion, some of which have been combined or restated for the sake of discussion herein. First, they contend that Ms. Myers was an independent contractor rather than an employee and

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[17] The Court notes that the parties' sniping is not limited to one another but extends, at least in the case of defense counsel, to the Court itself. During Ms. Myers's deposition, the following exchange occurred:

> Q [by defense counsel]: Okay. So she wasn't – she wasn't subjugated – well, that's not a good word. That's too big a word for you. The fact that she was a woman didn't make any difference? She was rewarded for her hard work and her good ideas; isn't that right?
>
> A [by Ms. Myers]: I'm sorry. Rephrase the question. I was–
>
> Q: I apologize. That wasn't intended to be denigrating.
>
> A: That's okay.
>
> Q: It's a word that doesn't – I was using a word that really isn't a good deposition word because you want a deposition to be simple that, you know, everyone, **including a federal judge**, can understand it.

(Myers Dep. at 173-74) (emphasis added). The Court is unsure as to whether defense counsel was making reference to the undersigned federal judge, one of the judges on the Eleventh Circuit Court of Appeals, a Justice of the United States Supreme Court, or federal judges in general, but the Court assures defense counsel that the undersigned understands the word "subjugated" and suggests that counsel be mindful that their deposition comments are likely to appear in the record that will later be reviewed by the Court.

that therefore she cannot bring a claim under Title VII or the FCRA. Second, they aver that Ms. Myers did not timely exhaust the Title VII and FCRA administrative procedures. Third, they assert that Ms. Myers's sexual harassment claims fail as a matter of law. Fourth, the corporate Defendants argue that Ms. Myers cannot state a prima facie case of retaliation and that the retaliation claims fail on the issue of pretext as well. Finally, the Defendants assert that Ms. Myers's state-law battery and false imprisonment claims are time-barred and otherwise fail. These arguments are addressed in turn.

1. Independent Contractor or Employee

Title VII and the FCRA apply to claims by an "employee" against an "employer." *See* 42 U.S.C. § 2000e-2(a); § 760.10(1), Fla. Stat.[18] The corporate Defendants contend that Ms. Myers was an independent contractor rather than an employee and that therefore she is not a proper Title VII or FCRA plaintiff.

In the Eleventh Circuit, "the term 'employee' in cases under Title VII is to be construed in light of general common law concepts." *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 340-41 (11th Cir. 1982). "[I]t is the

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[18] Ms. Myers brings claims under both Title VII and the FCRA. Courts consistently apply case law interpreting Title VII to claims under the FCRA because the FCRA is patterned on Title VII. *See, e.g., Wilbur v. Corr. Servs. Corp.*, 393 F.3d 1192, 1195 n.1 (11th Cir. 2004). Hence, the discussion of the Title VII claims in this Order applies equally to the FCRA claims, and the FCRA claims will not be addressed separately.

economic realities of the relationship viewed in light of the common law principles of agency and the right of the employer to control the employee that are determinative." *Id.* at 341; *accord Cuddeback v. Fla. Bd. of Educ.*, 381 F.3d 1230, 1234 (11th Cir. 2004).

In *Cobb*, the Eleventh Circuit endorsed the approach taken by the D.C. Circuit in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), and the Ninth Circuit in *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980), in resolving the issue of whether a worker was an employee or an independent contractor:

> This test calls for application of general principles of the law of agency to undisputed or established facts. Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor to review here, as it is at common law . . . . If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist.

Spirides, 613 F.2d at 831-32, *quoted in Cobb*, 673 F.2d at 340 (alteration in original). "[A]dditional factors which are relevant to the consideration of this issue" are:

> "(1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the 'employer' or the individual in question furnishes the equipment used and the place of work; the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the 'employer'; (9) whether the worker accumulates retirement benefits; (10) whether the 'employer' pays social security taxes; and (11) the intention of the parties."

Cobb, 673 F.2d at 340 (quoting *Spirides*, 613 F.2d at 832).

The corporate Defendants contend that "the totality of the evidence shows that [Ms.] Myers was an independent contractor, not Westgate's employee as she now claims." (Defs.' Mem. of Law in Supp. of Mot. for Summ. J., Doc. 94 at 4). Although it is undisputed that at the beginning of Ms. Myers's employment with Westgate she was an independent contractor,[19] as to the final years of her employment there are some factors weighing each way and as to other factors, the

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[19] *See* Undisputed Facts, Doc. 93 at 2 & Doc. 103 at 1.

evidence is in dispute, including, but not limited to, the intention of the parties regarding the nature of the employment relationship and, importantly, the amount of control the Defendants exercised over Ms. Myers. Construing the evidence in favor of the Ms. Myers as the nonmoving party, summary judgment is not appropriate on this issue. *See, e.g., Garcia v. Copenhaver, Bell & Assocs.*, 104 F.3d 1256, 1266-67 (11th Cir. 1997) (reversing magistrate judge's ruling on independent contractor issue and remanding for a jury trial in light of disputed facts on, inter alia, degree of control).

2. Exhaustion of Administrative Procedures

A plaintiff must exhaust administrative remedies before bringing a lawsuit alleging a violation of Title VII. *See* 42 U.S.C. § 2000e-5; *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1271 (11th Cir. 2002). In Florida, a plaintiff must file a charge of discrimination with an administrative agency "within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1); *see also Joe's Stone Crabs*, 296 F.3d at 1271. The Defendants seek summary judgment "as to all incidents predating November 19, 2000," (Doc. 94 at 10) – three hundred days before Ms. Myers filed her charge.[20] However, the

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[20] In the Second Amended Complaint, Ms. Myers alleges that she filed her charge on September 12, 2001 (Doc. 47 ¶ 271). In their motion, the Defendants state the date of filing as September 14, 2001. (Doc. 94 at 9). In her Response to Interrogatories, Ms. Myers gives the date of filing as September 14. (Pl.'s Ex. H at 6). For the purposes of this Order, this two-day difference is not significant.

Defendants' arguments on this point – which seem halfheartedly made – are not well-taken.

Ms. Myers's Title VII claims relate to her termination, which occurred in December 2000, and to an allegedly ongoing hostile work environment. Her administrative charge was clearly filed within three hundred days of the discrete event of her termination, and thus the charge is not untimely as to her termination claims.

With respect to Ms. Myers's hostile environment claim, the corporate Defendants are incorrect that she is limited to events occurring three hundred days prior to the filing of her charge. In *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002), the United States Supreme Court explained that "[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. . . . The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." The *Morgan* court held:

> The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile

> environment may be considered by a court for the purposes of determining liability.

536 U.S. at 117. In sum, "[i]n order for the charge to be timely, the employee need only file a charge within . . . 300 days of any act that is part of the hostile work environment." *Id.* at 118.

Ms. Myers claims that she was touched and grabbed by Mr. Siegel as late as Thanksgiving 2000 – after November 19, 2000. This is sufficient to render her hostile work environment charge timely. The corporate Defendants are not entitled to summary judgment on Ms. Myers's Title VII or FCRA claims on the basis of untimely administrative filing.

3. Sexual Harassment Claims (Counts I and III)[21]

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[21] In their motion, the Defendants argue that Ms. Myers cannot establish a prima facie case of disparate treatment based on sex because, inter alia, she cannot show that she was replaced by a male. However, this portion of the summary judgment motion is denied as moot because Ms. Myers has now clarified that she is not alleging claims of disparate treatment based on her gender.

In the Second Amended Complaint (Doc. 47), Ms. Myers sets forth many paragraphs of allegations and then incorporates those paragraphs in the enumerated counts in which she states her claims. Counts I and III, which are brought under Title VII and the FCRA, respectively, are entitled "Sex Discrimination and Harassment" and make reference to disparate treatment based on Ms. Myers's sex. (*See* Doc. 47 at 27, 28). In the Joint Pretrial Statement, however, the parties refer to claims of "harassment and retaliation." (*See* Doc. 120 at 2). Moreover, in her response to the summary judgment motion, Ms. Myers responds that "the applicable prima facie case is the one . . . for firings for refusing a superior's sexual advances" rather than one that includes replacement by a male as an element. (*See* Pl.'s Resp. in Opp'n to Def.'s Mot. for Summ. J., Doc. 102 at 10).

From these filings, it is clear to the Court that Ms. Myers is not bringing a claim of disparate treatment based on gender. Instead, in Counts I and III of the Second Amended Complaint, Ms. Myers is alleging both of the two types of actionable sexual harassment – "hostile work environment" sexual harassment and "tangible employment action" sexual harassment. Counts II and IV of the Amended Complaint allege retaliation in response to Ms. Myers's opposition to sexual harassment. This reading of the counts is consistent with Paragraph 270 of the Amended Complaint, which alleges that Ms. Myers "was terminated in retaliation for objecting to the sexual harassment she suffered and for refusing Defendant Siegel's sexual advances." (Doc. 47 ¶ 270). The record in this case makes clear that this is, if anything, a sexual harassment case rather than a

In Counts I and III of the Second Amended Complaint, Ms. Myers alleges both types of actionable sexual harassment – "tangible employment action" sexual harassment and "hostile work environment" sexual harassment. The corporate Defendants contend that they are entitled to summary judgment on these claims.

The two types of actionable harassment differ in their elements and manner of proof. As the Supreme Court has explained, "Title VII is violated by either explicit or constructive alterations in the terms of employment," *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752 (1998); "tangible employment action" harassment claims involve explicit alterations in the terms of employment, and "hostile work environment" harassment claims involve constructive alterations in the terms of employment, see id.; *see also Hulsey v. Pride Rests., LLC*, 367 F.3d 1238, 1245 (11th Cir. 2004) ("Sexual harassment in the workplace can alter the terms and conditions of employment in either of two ways. One way is if the employee's refusal to submit to a supervisor's sexual demands results in a tangible employment action being taken against her. . . . The second way . . . is if it is sufficiently severe and pervasive to effectively result in a change (sometimes referred to as a constructive change) in the

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disparate-treatment-based-on-gender case. Thus, to the extent that the Defendants argue in their summary judgment motion that Ms. Myers's disparate treatment gender-based claim fails, the motion is denied as moot. The two types of sexual harassment claims that Ms. Myers raises, as well as her retaliation claims, are addressed in the text.

terms and conditions of employment, even though the employee is not discharged, demoted, or reassigned. This is hostile work environment harassment.") (citations and footnote omitted).

"When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive." *Ellerth*, 524 U.S. at 753-54. The Court addresses Ms. Myers's two types of sexual harassment claims separately.

a. Hostile Work Environment Sexual Harassment

The Eleventh Circuit has explained:

> [T]o establish a claim of hostile-environment based on harassment by a supervisor, an employee must show: (1) that he or she belongs to a protected group; (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment must have been based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable.

Williams v. Motorola, Inc., 303 F.3d 1284, 1292-93 (11th Cir. 2002) (citing *Mendoza v.Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999)). In their summary judgment motion, the corporate Defendants challenge whether Ms. Myers can satisfy the second, third, and fourth elements.

Regarding the second element, although the corporate Defendants contend that any sexual conduct to which Ms. Myers was subjected was not "unwelcome" and that therefore Ms. Myers's claim fails, the Court cannot resolve this question on summary judgment. Ms. Myers has submitted evidence that Mr. Siegel's conduct made her uncomfortable and that she told him to stop. (*See, e.g.*, Decl. of Mary Fetzner, Pl.'s Ex. A ¶ 13 ("It was obvious the touching [of Ms. Myers's legs by Mr. Siegel] was unwanted by Myers. She pushed his hands away and had a disapproving look on her face."); *see also* Myers Dep.). Construing the evidence in the light most favorable to Ms. Myers, the issue of unwelcomeness is a question of fact.

The third element of a hostile environment claim is that the harassment was based on the plaintiff's sex. The corporate Defendants assert that any harassment that Ms. Myers suffered was not because of her sex but instead was "the venting of strong emotions between friends." (Doc. 94 at 18). The corporate Defendants rely on *Succar v. Dade County School Board*, 229 F.3d 1343, 1345 (11th Cir. 2000), wherein the Eleventh Circuit agreed with the district court's assessment that the harassment in that case – which was inflicted by plaintiff's co-worker, with whom the plaintiff had

previously engaged in a consensual sexual relationship — "was not the result of Plaintiff's gender 'but of responses to an individual because of her former intimate place in [that individual's] life.'" (quoting the district court opinion) (alteration in original). In other words, "[p]ersonal animosity is not the equivalent of sex discrimination," even where the parties have a past intimate relationship. *Id.* However, the *Succar* court did not hold that any time the parties have a personal relationship there can be no sexual harassment claim, and notably the harassment in that case was not of a sexual nature. *See Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1188-89 (11th Cir. 2001) (noting that the plaintiff's "personal relationship with [her harassing supervisor] was definitely a factor to be considered by the jury in its analysis of whether the discrimination was based on sex" and that "[i]t is also important that [the supervisor's] conduct towards [the plaintiff] was sexual in nature, while the harassment that Succar suffered was not"). Moreover, in this case the parties agree that Mr. Siegel and Ms. Myers were friends but not lovers. At a minimum, the issue of whether the harassment of Ms. Myers was based on her sex is a jury issue in this case.

The fourth element requires that the harassment be both objectively and subjectively severe or pervasive, alter the terms and conditions of employment, and create a discriminatorily abusive working environment in order to be actionable. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable

person would find hostile or abusive – is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."). "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23; *accord Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 584 (11th Cir. 2000) (listing factors to be used in assessing severity and pervasiveness).

Ms. Myers's hostile environment claim fails at the "severe or pervasive" element because she did not perceive her working environment as hostile or abusive, and a reasonable person would not have perceived it as such either. Ms. Myers's own deposition testimony establishes that the harassment was not "sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment" as required for an actionable hostile environment claim. Ms. Myers testified that she did not feel threatened by Mr. Siegel. (*See, e.g.*, Myers Dep. at 354 ("He was not threatening me.")). There is no evidence that Mr. Siegel's conduct negatively impacted Ms. Myers's work performance or career progression at all; in fact, she rose from an apparently entry-level sales position to executive spa director, and her salary steadily rose, even doubling during the final two years of her employment. (*See, e.g., id.* at 323 (testimony that Ms. Myers was

embarrassed by the rumors around the company but that she did not suffer in compensation or title). She completed her duties and the spa opened on time – a point of pride for Ms. Myers. (*See id.* at 157). Further – as will be discussed in more detail in connection with Ms. Myers's termination claims – although Ms. Myers disagrees with the Defendants' assessment of her performance managing the spa, she does not attribute any problems with the spa's profitability to the harassment. She complains about being yelled at on the job but she acknowledges that Mr. Siegel yelled at everyone. Moreover, there is no evidence that Ms. Myers sought counseling or suffered psychological harm. *See Harris*, 510 U.S. at 23 ("The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive."). Thus, Ms. Myers's own testimony establishes that Ms. Myers did not subjectively perceive the harassment to be so severe or pervasive that it created a hostile work environment.

Additionally, from an objective standpoint, consideration of the factors noted above does not support severity or pervasiveness in this case. First, the harassing conduct, considered as a whole, cannot be said to have occurred with great frequency. Ms. Myers alleges ten to twenty touchings – mostly of her legs, but sometimes of her butt – over a period of approximately five years – two to four per year; thus, the touchings were infrequent. She alleges that comments were made with more frequency, but these were "merely offensive utterances" and some of them consisted of Mr. Siegel telling her she "looked beautiful" that day. Moreover, many of the comments were made in social settings outside the workplace

altogether – including Siegel family gatherings which Ms. Myers voluntarily[22] attended while dating Richard Siegel – and throughout her employment Ms. Myers considered Mr. Siegel a friend. In sum, considering the totality of the circumstances, from an objective standpoint the harassment did not rise to the requisite level of severity or pervasiveness. *Cf., e.g., Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333, 337 (7th Cir. 1993) (noting authority "that a grant of summary judgment was appropriate despite the plaintiff being subjected to propositions, lewd comments and a slap on the buttocks when these were relatively isolated instances").

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[22] *Cf. Devlin v. Teachers' Ins. & Annuity Ass'n of Am.*, No. 02 Civ. 3228(JSR), 2003 WL 1738969, at *2 (S.D.N.Y. Apr. 2, 2003) (noting that generally "'employers are not responsible under Title VII for hostile sexual acts resulting from nonwork-related, off-duty interactions between co-employees,' because those actions are not part of the work environment" but that in some circumstances, such as "where a supervisor uses his authority to compel the victim of harassment to meet outside the office, the harassing acts might be imputed to the employer") (citations omitted). In this case, Ms. Myers has not alleged any acts by Mr. Siegel compelling her to go on trips with him or to socialize with his family.

For the purposes of ruling on this motion, the Court has taken as true Ms. Myers's allegations as to the conduct of Jackie Mallory and has considered it in the assessment of the severity of the environment. However, these instances were largely outside the workplace, and it is far from clear that the conduct of a girlfriend or wife is attributable to the boyfriend or husband in a sexual harassment case. The parties have not presented authority with respect to this, and the Court need not resolve this issue.

Because the harassment was not, subjectively or objectively, "sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment," Ms. Myers's hostile work environment claims fail. Summary judgment is granted to the corporate Defendants on these Title VII and FCRA claims.

b. Tangible Employment Action Sexual Harassment

As discussed earlier, Ms. Myers also brings claims of "tangible employment action" sexual harassment. To establish a claim of such harassment, Ms. Myers must show that: "'(1) [she] belongs to a protected group; (2) [she] was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; and (4) [her] reaction to the unwelcome behavior affected tangible aspects of [her] compensation, or terms, conditions or privileges of employment.'" *Brown v. Snow*, 440 F.3d 1259, 1265 (11th Cir. (quoting *Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1361 (11th Cir. 1994)). Ms. Myers clearly satisfies the first element, and as noted in the prior section there is at least a jury issue as to the second and third elements. However, the corporate Defendants vigorously contest whether Ms. Myers can satisfy the fourth element – that her resistance of Mr. Siegel's advances resulted in a tangible employment action.

It is undisputed that Ms. Myers was terminated, but the parties dispute whether her termination was causally related to her rebuff of Mr. Siegel so as to satisfy the fourth element of this claim. *See Cotton v. Cracker Barrel Old Country Store*, 434 F.3d 1227, 1231

(11th Cir. 2006) ("There also must be a causal link between the tangible employment action and the sexual harassment."). The corporate Defendants assert that there is no causal connection because Ms. Myers's rejections of Mr. Siegel last occurred, say Defendants, in 1995 or 1996 – several years before her termination in December 2000. However, as Ms. Myers points out, the Defendants ignore that Ms. Myers has testified to incidents occurring much later than 1995 or 1996; indeed, she alleges that incidents occurred at the spa as late as Thanksgiving 2000. It is unclear to the Court why the Defendants have focused only on the 1995 and 1996 timeframe; although Mr. Siegel's explicit requests to date Ms. Myers occurred years earlier, the allegedly unwanted touchings and comments were not so remote in time.

Nevertheless, Ms. Myers has failed to present evidence supporting a causal connection between any harassment she suffered and her termination. Ms. Myers contends in her memorandum that "even if it were true that a long time passed between rejection of Siegel's advances and Plaintiff's firing, the court would not be permitted to weigh that evidence on summary judgment." (Doc. 102 at 12). However, the Court need not *weigh* evidence in order to find a *lack* of evidence of a causal connection. "Although temporal proximity between the harassment and a tangible employment action can give rise to a genuine issue of fact as to causation," it does not always do so and does not do so in this case. *See Cotton*, 434 F.3d at 1232. Although the Defendants are incorrect in relying only on the earlier rejections of Mr. Siegel's advances, the earlier advances were more explicit, and Ms. Myers acknowledged throughout her deposition that she

never suffered any adverse consequence at work after her express rejections of Mr. Siegel's interest in a relationship with her. Some offensive conduct continued, but it certainly cannot be said to have escalated in the time leading up to her termination. As the Defendants correctly note, despite rejecting Mr. Siegel – in 1995, 1996, and thereafter – throughout that time Ms. Myers advanced at the company rather than suffering. From March or April 2000 until November 2000, Mr. Siegel allowed Ms. Myers to stay at a condominium he owned while her own condominium was being renovated. Ms. Myers does not allege any change in Mr. Siegel's behavior over this time; she merely speculates that Mr. Siegel became upset and jealous when she became engaged to her boyfriend in late 2000. However, her speculation is insufficient to establish a causal connection between her rejection of Mr. Siegel and her termination, especially considering the overwhelming evidence of longstanding issues regarding Ms. Myers's management of the spa – concerns of which Ms. Myers was aware before she even met Cleve Loveland.

As will be discussed at greater length in the next section, there is undisputed evidence that Ms. Myers was terminated following an investigation that was initiated by the complaint of Bill Toth, and there is also undisputed evidence – including, importantly, the testimony of Ms. Myers herself – that upper management was not pleased with Ms. Myers's running of the spa and not been pleased with it for quite some time. Ms. Myers admitted to at least some of the allegations that were made against her in connection with the investigation, and she was then terminated. Even accepting as true Ms. Myers's

evidence of harassment in the fall of 2000, there is no reasonable inference of a causal connection between her rejections of that harassment and her termination. *See Dearth v. Collins*, 441 F.3d 931, 936 n.6 (11th Cir. 2006) (noting that the plaintiff's wrongful termination claim failed because the employer "presented unrebutted evidence that other . . . employees complained repeatedly about [the plaintiff's] rude behavior and attitude and that [the alleged harasser, who was the president and sole shareholder of the company] had originally intended to terminate [the plaintiff]" nine months earlier; the plaintiff was terminated after complaints about the plaintiff increased, and a receptionist "reportedly quit because she could no longer work with [the plaintiff]"; and the employer "established that [the plaintiff] was terminated for her job performance, and the evidence did not establish any causal link between her termination and the alleged sexual harassment"); *Frederick v. Sprint / United Mgmt. Co.*, 246 F.3d 1305, 131213 (11th Cir. 2001) (affirming district court's grant of summary judgment on tangible employment action sexual harassment claim "[i]n light of the unrebutted evidence showing that [the plaintiff] was denied the promotion . . . on grounds independent of the alleged harassment"); *cf. Cotton*, 434 F.3d at 1232 ("When an employer contemplates a given action before the harassment takes place, temporal proximity between the action and the incident or harassment alone will not suffice to show causation."). Thus, the corporate Defendants are entitled to summary judgment on Ms. Myers's "tangible employment action" harassment claims.

4. Retaliation Claims (Counts II and IV)

In Counts II and IV of her Second Amended Complaint, Ms. Myers brings claims of retaliation under Title VII and the FCRA. The anti-retaliation provision of Title VII provides in part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).[23] Ms. Myers contends that she was terminated in retaliation for complaining about Mr. Siegel's harassment.

Ms. Myers's retaliation claim is appropriately analyzed using the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792

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[23] *See also* § 760.10(7), Fla. Stat. (providing that "[i]t is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section").

(1973), and its progeny.[24]Under this framework, the plaintiff has the initial burden to establish a prima facie case of retaliation by a preponderance of the evidence. As the Eleventh Circuit has noted, "[d]emonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997). If the plaintiff establishes a prima facie case, a presumption of discrimination arises. *See, e.g., Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

If the plaintiff presents a prima facie case, the burden "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason" for its actions. *McDonnell Douglas*, 411 U.S. at 802. The employer's

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[24] This framework does not apply to Ms. Myers's sexual harassment claims. *See Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 510-11 (11th Cir. 2000) (criticizing the district court for applying the *McDonnell Douglas* analysis to sexual harassment case and holding, "We are unwilling to read the *McDonnell Douglas-Burdine* framework into non-retaliation sexual harassment cases at this point. These types of cases have evolved quite separately from other Title VII cases, and applying a burden-shifting analysis to them would be a departure from precedent.") (citing *Henson v. City of Dundee*, 682 F.2d 897, 905 n.11 (11th Cir. 1982)) (footnote omitted). Sexual harassment claims are analyzed using "normal principles of pleading and proof allocation." *Henson*, 682 F.2d at 905 n.11); *accord McAward v. Sanibel Fire & Rescue Dist.*, No. 2:04cv627FTM29DNF, 2005 WL 1126657, at *2 (M.D. Fla. May 9, 2005). Regardless of the different analyses, however, there is some overlap in the consideration of the claims and in the issues of causation and pretext.

"burden is one of production, not persuasion; it 'can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993)). "If the employer satisfies its burden by articulating one or more reasons, then the presumption of discrimination is rebutted, and the burden of production shifts to the plaintiff to offer evidence that the alleged reason of the employer is a pretext for illegal discrimination." *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1087 (11th Cir. 2004). "To establish a prima facie case of retaliation, a plaintiff must show that (1) she engaged in protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between the protected activity and the adverse employment action." *Stavropoulos v. Firestone*, 361 F.3d 610, 616 (11th Cir. 2004). The Defendants dispute Ms. Myers's satisfaction of a prima facie case of retaliation, and they also assert that Ms. Myers has not presented evidence of pretext.

First, the Defendants contend that Ms. Myers has not shown that she engaged in protected activity. The Defendants assert that Ms. Myers did not complain about harassment and that even if she did complain, she did not have a reasonable belief that the Defendants were engaging in unlawful employment practices. *See, e.g., Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1311 (11th Cir. 2002) ("To establish that a plaintiff engaged in statutorily protected expression, we have held that a plaintiff must show that she 'had a good faith, reasonable belief that the employer was engaged in unlawful employment practices.'") (quoting *Little v. United Tech., Carrier Transicold Div.*, 103

F.3d 956, 960 (11th Cir. 1997)). Ms. Myers responds, however, that she complained to Human Resources director Sandra Jones, CEO Mark Waltrip, and operations director Paul Bosch about Mr. Siegel's actions.

As correctly noted by Ms. Myers, the fact that these witnesses might deny that Ms. Myers complained to them creates a credibility issue which must be resolved in her favor at the summary judgment stage. Ms. Myers cites several portions of the record for her contention that she reported the harassment, some of which give absolutely no time frame for her complaints. (*See* Pl.s' Resp. to Def. Westgate Resorts, Ltd.'s First Set of Interrogs., Pl.'s Ex. H at 7).[25] Ms. Myers also relies on he deposition testimony of Sandy Jones; in the testimony that Ms. Myers cites, Ms. Jones states that during a conversation that she had with Ms. Myers regarding a complaint that another employee made against Ms. Myers, Ms. Myers told Ms. Jones "about a time when she went out with [Mr. Siegel] socially together on a date, and that she just realized that she didn't have feelings for him that were more than friendship." (Dep. of Sandra Jones at 24:12-15; *see* Pl.'s Resp. to Def.'s Statement of Facts, Doc. 103 at 17 ¶ 104 (citing this testimony)). In the other testimony of Ms. Jones upon which Ms. Myers relies, Ms. Jones states that Ms. Myers told her that she had gone to New York with Mr. Siegel and that she did not expect that they would be in the same room

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[25] Although the interrogatory asked Ms. Myers to give the date she made these complaints, she did not provide dates in her answers. (Pl.'s Ex. H at 7 ¶ 22).

and she was unhappy about it. (Jones Dep. at 25:11-17; *see* Pl.'s Resp. to Def.'s Statement of Facts, Doc. 103 at 17 ¶ 105 (citing this testimony[26])). Ms. Jones testified in her deposition that these statements by Ms. Myers were made in the context of "chitchat" that Ms. Myers made about her personal life and her boyfriends. (*See* Jones Dep. at 23-25).

Ms. Myers also cites her own deposition testimony regarding reports she made to Mark Waltrip and Paul Bosch. Ms. Myers testified in her deposition that in October or November 2000, Mark Waltrip asked her to meet with him and Paul Bosch, and during the meeting Waltrip "started right in on [her] about the spa not being profitable." (Myers Dep. at 330). Ms. Myers defended herself about why she felt the spa was not profitable, and Mr. Waltrip then began to criticize her management skills and suggested that she focus on designing spas for Westgate rather than managing them. (*Id.* at 331). Ms. Myers told Mr. Waltrip that that was not the agreement she had with Mr. Siegel and that she was not willing to take on more responsibility without additional compensation. (*Id.*). Mr. Waltrip then criticized Ms. Myers's salary and told her he had spoken to Mr. Siegel about halving it. (*Id.* at 332). At that point Ms. Myers told Waltrip that if Mr. Siegel had "agreed to cut [her] salary in half, . . . it's not about anything other than it's personal," and she started to cry. (*Id.* at 332-33). Ms. Myers told Waltrip that it was "obviously because [she was] in

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[26] Ms. Myers's Statement of Facts actually omits the deposition page number, but the Court was able to locate the testimony on page 25.

love with Cleve and [they were] talking about getting married"; Waltrip then told her it was "like waving a red flag in front of a bull" for her to sponsor a golf tournament with Cleve Loveland. (*Id.* at 333). Mr. Waltrip then left the meeting, and Ms. Myers "spilled her guts" to Paul Bosch about how there were rumors of an affair and how she did not "get any support from this company regarding the spa." (*Id.* at 334). According to Ms. Myers, Mr. Bosch responded by saying, "I don't know anything about all the nepotism here. . . . all I know is that you might want to consider leaving the company. Maybe you can't handle it. You might want to consider leaving." (*Id.* at 335).[27]

Although Ms. Myers's own account of what she told these people reflects that her complaint may have fallen short of what is required by the law to put an

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[27] Mr. Bosch denies having any such conversation with Ms. Myers. (*See* Aff. of Paul Bosch). However, for the purposes of summary judgment Ms. Myers's version of events must be taken as true.

employer on notice of an alleged Title VII violation,[28] the Court will assume for summary judgment purposes that Ms. Myers's complaints were sufficient. *See, e.g., Primas v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 5:04CV342(DF), 2006 WL 839242, at *11 (M.D. Ga. Mar. 30, 2006) ("[T]he Court will assume that her actions constitute statutorily protected activity, though it is less than clear that they do."). Additionally, notwithstanding that the Court has already concluded that Ms. Myers's harassment claims fail, the Court will also give Ms. Myers the benefit of the doubt that she had a reasonable belief that an unlawful employment practice had been committed at the time she complained.

Although Ms. Myers's termination satisfies the second element of her retaliation claim, she has not presented evidence supporting a causal connection between any protected activity and her termination.

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[28] Ms. Myers states that she told Waltrip that "it was personal," and she states that Mr. Bosch told her that perhaps she should leave because she could not handle nepotism at the company. Title VII does not provide a cause of action against personal animosity or nepotism, and the testimony upon which Ms. Myers relies regarding her complaint to Sandra Jones also does not clearly reflect a harassment complaint. *See Dieser v. Gloucester County Office of the Sheriff*, No. Civ. 03-2039, 2006 WL 827788, at *5 (D.N.J. Mar. 29, 2006) (noting that "[c]omplaints that are too vague or that make a general complaint about unfair treatment without alleging that the employer engaged in unlawful discriminatory conduct do not qualify as protected activity") (internal quotation omitted). However, as noted in the text the Court will assume arguendo that the complaints were made and that they were complaints of an unlawful employment practice.

Notably, each of Ms. Myers's complaints – to Waltrip, Bosch, and Jones – was made by Ms. Myers after these employees had brought up to Ms. Myers a problem with her performance or a complaint against her. The complaints to Waltrip and Bosch were made after a meeting regarding spa profitability, and the complaint to Jones occurred after Jones had a discussion with Ms. Myers about a complaint made against Ms. Myers by another employee. An inference of a causal connection based on temporal proximity is negated where there are performance issues that predate protected activity. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) ("[The employer] concededly was contemplating the transfer before it learned of the suit. Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality."); *Kasper v. Federated Mut. Ins. Co.*, 425 F.3d 496, 504 (8th Cir. 2005) ("Evidence of an employer's concerns about an employee's performance before the employee's protected activity undercuts a finding of causation."); *Pipkins v. City of Temple Terrace, Fla.*, 267 F.3d 1197, 1201 (11th Cir. 2001) ("[A]ny protected expression on [the plaintiff's] part occurred only after the commencement of the adverse employment actions of which she complains."); *Marcelin v. Eckerd Corp. of Fla.*, No. 8:04-CV-491-T-17MAP, 2006 WL 923745, at *10 (M.D. Fla. Apr. 10, 2006) ("[T]he significance of temporal proximity is negated where, as is the case here, the employee has concerns about the employee's performance that predate protected conduct."). Thus,

Ms. Myers has not stated a prima facie case of retaliatory termination.

Moreover, assuming arguendo that Ms. Myers had stated a prima facie case of retaliation, the corporate Defendants have met their burden of articulating a legitimate, nondiscriminatory reason for their termination of Ms. Myers – the poor financial performance of the spa of which Ms. Myers was the Executive Director, as well as substantiated allegations of misconduct by Ms. Myers. Thus, the corporate Defendants are entitled to summary judgment on the retaliatory termination claims unless Ms. Myers presents evidence creating a genuine issue of material fact regarding whether these reasons are a mere pretext for discrimination. *See, e.g., Chapman v. AI Transp.*, 229 F.3d 1012, 1024-25 (11th Cir.2000) ("If the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim."); *accord Evans v. McClain of Ga., Inc.*, 131 F.3d 957, 964-65 (11th Cir. 1997) ("Under the established rule of law in this Circuit, a plaintiff can survive a motion for summary judgment or for judgment as a matter of law simply by presenting evidence sufficient to demonstrate a genuine issue of material fact as to the truth or falsity of the employer's legitimate, nondiscriminatory reasons.").

"To show that the employer's reasons were pretextual, the plaintiff must demonstrate 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's

proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.'" *Cooper v. S. Co.*, 390 F.3d 695, 725 (11th Cir. 2004) (quoting *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997)). Ms. Myers has not done so. *Cf. Tidwell v. Carter Prods.*, 135 F.3d 1422, 1427 (11th Cir. 1998) (finding no issue raised as to pretext where the plaintiff did "not provide the needed 'more than a scintilla of evidence' to survive a motion for judgment as a matter of law" and did "not present a substantial conflict in evidence as to [the employer's] purported reason for terminating [the plaintiff] . . . as to support a jury question").

Although Ms. Myers contends that there is no way that the spa could have been profitable in the first year and that the Defendants tied her hands by not allowing her to market the spa locally, it is not for the Court do reexamine the Defendants' business judgment. Ms. Myers acknowledges in her deposition that how to market and run the spa had been an issue since even before it opened – more than a year before she was terminated. Ms. Myers was aware of Mr. Siegel's concerns and unhappiness with her management well before she was terminated. Indeed, in a memorandum dated November 15, 1999, that Ms. Myers has submitted with her opposition papers, Ms. Myers wrote to Mr. Siegel in part: "I give up! Since it is apparent you do not trust my management ability and you have once again put an obstacle in front of me this time unfortunately I do not know how I will overcome. [sic] To expect a brand new business to make money in the first two weeks of operation is not only unrealistic, but unheard of." In that same memo, Ms. Myers told Mr. Siegel:

> So as I said before I give up! You have insulted me yet once again and you know what the funny thing is David, everyone told me this is exactly what I should expect. But you know what, I did not believe them.
> I have a meeting scheduled with you on Wednesday at 2 PM and I would appreciate it if you would have prepared for me exactly what you expect from my department and me. . . . It is apparent you do not trust my judgment, so I need those answers on Wednesday. . . .
> . . . Unfortunately I cannot trust what you say and I need to have it all in writing to protect my department and myself. It is sad even at this point after everything that I have accomplished, under the most ridiculous of circumstances, that you still do not trust my judgment. However, you have not all along, so although this is hurtful, it is nothing new.
> . . . As always, as I have said in the past, this is your spa and from now on if you insist on micromanaging, you need to make sure everything is outlined for detail for me in writing.

(Fax Mem. from Georgette Myers to David Siegel of 11/15/99, Pl.'s Ex. L). Ms. Myers acknowledges that she was faulted for the spa's financial woes before she

complained about harassment,[29] and this memo was written while she was still dating Richard Siegel, months before she had begun dating Cleve Loveland. She also explained at length in her deposition that she and Mark Waltrip never saw eye to eye and that she had a target on her back as far as Waltrip was concerned; he did not like her or anyone else who bypassed him and got into favor with Mr. Siegel. Indeed, after Waltrip discussed the profitability of the spa with her in October 2000 and suggested she focus on design rather than management, Ms. Myers went to Mr. Siegel seeking reassurance for her job because she didn't trust Waltrip. In the face of this evidence – which comes from Ms. Myers herself, not the Defendants – Ms. Myers's theory that she was terminated because Mr. Siegel was jealous of her engagement to Cleve Loveland does not hold up.

Ms. Myers also contends that the Defendants have been inconsistent in their reasons for her termination and that this inconsistency shows pretext. However, the Court discerns no such inconsistency. First of all, Ms. Myers states in her opposition memorandum that "Defendants have repeatedly changed their story about the reasons Plaintiff was terminated" and that "allegations [regarding the Toth-initiated investigation] are completely abandoned in this

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[29] The fact that there was nothing in writing issued to Ms. Myers regarding her performance prior to her termination is of no moment given that Ms. Myers acknowledges that Mr. Siegel and Waltrip had repeated discussions with her about the spa's performance and in light of other evidence reflecting that Ms. Myers was aware of their concerns.

summary judgment motion." (Doc. 102 at 13). However, in their motion papers the Defendants state "[w]hile her termination was justified for several reasons, the main reason for Myers'[s] termination was her inability to make a profit, or, at least, reduce the Spa's losses." (Doc. 94 at 14). The Court does not read this as an abandonment of the investigation results as an additional reason.

Moreover, the deposition testimony upon which Ms. Myers relies for the proposition that the Defendants' reasons for her termination are inconsistent does not reflect inconsistency. True, Gary Pearce, who worked in the human resources department and was involved in the investigation that was conducted after the Toth complaint, testified in his deposition that the main reason that Ms. Myers was terminated was "misappropriation of company funds by allowing an employee to run her errands and clean her house while the company was paying for it and violation of our drug-free workplace policy, which is drinking alcohol while punched in and on the clock in the office." (Dep. of Gary Pearce, Pl.'s Ex. G, at 28). On the other hand, David Siegel testified in his deposition that the primary reason that Ms. Myers was terminated was the fact that the spa continued to lose money; he identified secondary reasons as misuse of spa certificates, using spa personnel to run errands for her and clean her house, arriving at the spa intoxicated, and offering alcohol to spa employees. (Dep. of David Siegel at 37-38). Mr. Siegel explained that if Ms. Myers had been doing a better of job of running the spa, he probably would have disciplined her rather than terminated her for the other problems. (David Siegel Dep. at 38).

As Ms. Myers has acknowledged, Mr. Siegel was "all about dollars," and thus it is not surprising that he would emphasize "the numbers" when asked why Ms. Myers was terminated. Moreover, he explained that the results of the investigation were secondary reasons for the termination and that his response to the outcome of the investigation might have been different if not for the preexisting problems at the spa. Mr. Siegel's explanation is not inconsistent with that of the witnesses who were involved in the investigation of the Toth complaint; it is clear that the investigation was the last straw as far as Ms. Myers's employment was concerned, no matter how it is characterized. And again, Ms. Myers has admitted to at least some of the misconduct that was turned up in that investigation.

As the Eleventh Circuit has explained, "[t]he inquiry into pretext centers upon the employer's beliefs, and not the employee's own perceptions of [her] performance." *Holifield*, 115 F.3d at 1565; *accord Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1332-33 (11th Cir. 1998). "Title VII is not designed to make federal courts sit as a super-personnel department that reexamines an entity's business decisions." *Davis v. Town of Lake Park*, 245 F.3d 1232, 1244 (11th Cir. 2001) (internal quotation omitted). "'[A] plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer.'" *Tidwell v. Carter Prods.*, 135 F.3d 1422, 1427 (11th Cir. 1998) (quoting *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997)). Ms. Myers has not presented "'such weaknesses, implausibilities, inconsistencies,

incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.'" *Cooper v. S. Co.*, 390 F.3d 695, 725 (11th Cir. 2004) (quoting *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997)). Thus, the corporate Defendants are entitled to summary judgment on Ms. Myers's retaliation claims.

5. Battery and False Imprisonment

Finally, the Defendants assert that Ms. Myers's state-law battery and false imprisonment claims fail as a matter of law. In light of the Court's disposition of Ms. Myers's federal claims, these state law claims will be remanded to the state court from which this case was removed. *See* 28 U.S.C. § 1367(c).

III. Conclusion

As noted earlier, the Court's task in reviewing the merits of the instant motion has been made difficult by the parties' personal attacks and failure to objectively present the record. However, the Court has thoroughly reviewed the record evidence and concludes, based on that record evidence rather than either side's characterization of it, that as a matter of law Ms. Myers cannot prevail on her discrimination claims. Therefore, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendants' Motion for Summary Judgment (Doc. 93) is **GRANTED** as to Ms. Myers's claims under Title VII (Counts I and II) and the FCRA (Counts III and IV).

2. Defendants' Motion for Summary Judgment (Doc. 93) is **DENIED without prejudice** as to Ms. Myers's state law battery and false imprisonment claims (Counts VII and VIII). Pursuant to 28 U.S.C. § 1367(c), these claims (Counts VII and VIII) are **REMANDED** to the Circuit Court, Ninth Judicial Circuit, in and for Orange County, Florida, Case No. 2004CA-6566, Div. 37, *Dawn Georgette Myers v. Central Florida Investments, Inc. et al.*

3. All other pending motions are **DENIED as moot.**

4. The Clerk is directed to enter judgment for Defendants Central Florida Investments, Inc., CFI Sales and Marketing, Ltd., Westgate Resorts, Inc., and Westgate Resorts, Ltd. on Counts I through IV of the Second Amended Complaint in accordance with this Order. Thereafter, the Clerk shall close this file.

DONE and **ORDERED** in Orlando, Florida this 24th day of April, 2006.

/s/
JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

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No. 07-660

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

DAWN GEORGETTE MYERS,

Petitioner,

vs.

CENTRAL FLORIDA INVESTMENTS, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit's conclusion that Myers could not show that Siegel's decision to file unrelated lawsuits against her after she was discharged was retaliatory, conflicts with this Court's precedent in *Burlington Northern & Santa Fe Ry. Co. v. White* or with any subsequent relevant circuit court opinion.

II. Whether the Eleventh Circuit's Opinion conflicts with this Court's decisions regarding corporate alter egos in *Faragher v. City of Boca Raton* or *Burlington Indus., Inc. v. Ellerth* or with any other relevant circuit court opinion.

III. Whether the Eleventh Circuit's Opinion rejecting Myers' speculative claim of pretext and sustaining CFI's legitimate nondiscriminatory reason for discharging Myers, which Myers wholly failed to rebut, conflicts with any relevant decision of this Court or with any other relevant circuit court opinion.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Respondents, David Siegel, Central Florida Investments, Inc., CFI Sales & Marketing, Ltd., Westgate Resorts, Inc. and Westgate Resorts, Ltd., identify Central Florida Investments, Inc.'s parent corporations as the David A. Siegel Irrevocable Trust (99%) and the David A. Siegel Revocable Trust (1%); and identify Westgate Resorts, Ltd.'s parent corporations as Central Florida Investments, Inc. (99%) and the David A. Siegel Irrevocable Trust (.5%). Respondents further state that there is no publicly held company owning 10% or more of the stock of any of the foregoing entities.

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STATEMENT OF CASE AND FACTS

Central Florida Investments, Inc., and its various subsidiary companies (collectively "CFI") develop, manage and sell timeshare resorts in, *inter alia*, Orlando, Florida. During Dawn Georgette Myers' ("Myers") employment with CFI, she held several positions, culminating with the executive director of a new Spa at Westgate Lakes, one of CFI's resorts. (App. B at 5a).[1] While Myers was working at Westgate Vacation Villas doing inhouse sales, she shared with CFI's president and CEO, David Siegel ("Siegel"), her ideas about creating a Spa at one of Westgate's resorts. (App. D at 20a). Eventually, Siegel supported this idea. *Id.* Myers had never worked in a Spa and had no background or experience with Spa design or management. *Id.* at 20a, 21a.

In January, 1998 Siegel named Myers Executive Spa Director of the yet-to-be-built Spa. The promotion came with an increase in pay. *Id.* at 21a. By that time, her pay structure as a timeshare salesperson had been changed from commission-based to a salary of $1,000 per week. *Id.* After she stopped selling timeshare and began working solely for the Spa, her weekly salary increased over time from $1,000 to $1,200, to $1,500 and finally to $2,000 per week. *Id.* Her salary doubled between 1998 and 2000. *Id.*

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[1] In lieu of reproducing the opinions below provided in Petitioner's Appendix, Respondents have adopted the Petitioner's Appendix. Unless otherwise noted, all citations are to that Appendix.

> Myers well knew that Siegel was "all about dollars," so Myers knew that the Spa she envisioned must make money for Westgate. So[,] she emphasized the financial rewards, both directly and indirectly, of having a Spa at one of CFI's resorts. The idea floated around for about a year. Siegel then told Myers that a Spa would be built at Westgate Lakes Resort. . . . Since Myers had no background or experience designing or managing a Spa, for the next year, she researched Spa design and management.

Id. at 34a, 35a.

The Papillion Spa opened in November, 1999. *Id.* at 21a. "Well before the Spa opened, Myers knew that Siegel expected, even demanded, that the Spa be profitable." *Id.* at 37a. However, the Spa was not profitable and Siegel and CFI's Chief Operating Officer, Mark Waltrip ("Waltrip"), frequently discussed with Myers her failure to meet profitability goals. *Id.* Through November, 2000, the Spa was showing an overall loss. *Id.* at 38a.

Sometime before then, Waltrip called Myers to his office for a meeting. *Id.* at 37a. Waltrip "started right in on [her] about the Spa not being profitable." *Id.* She tried to explain her view of why it was not profitable, but Waltrip criticized her management skills and told her she would be better off just designing Spas for the company rather than managing them. *Id.*

In late November or early December, 2000, the lead massage therapist at the Spa since its inception, Bill Toth ("Toth"), threatened to resign because he was "very unhappy there and was not being treated with great respect." *Id.* at 38a, 39a. Myers was insulting to him; was absent from the Spa a lot; and had a "very demeaning" attitude, treating him like he had no understanding at all of the Spa industry. *Id.* at 39a. Toth also talked to Waltrip. Waltrip "was very proactive on the situation." *Id.* at 40a. After Toth's attempted resignation, an investigation was conducted and other Spa employees were asked to provide statements. *Id.* After Waltrip spoke with Toth and learned of the Spa's low morale, he called Siegel and told him there was an issue about the Spa. *Id.* Siegel assumed that Waltrip was referring to profitability, but, instead, Waltrip told him of Toth's charges and recommended Myers' immediate suspension and an investigation. *Id.* Siegel agreed. Myers was suspended and a team from human resources and security conducted an investigation, including interview of the Spa employees. *Id.* According to Waltrip, "a substantial number" of the Spa employees agreed with Toth. *Id.* There was corroboration of instances of Myers being hung over, sleeping in a treatment room, drinking on the job, and using employees for personal tasks. *Id.*

Prior to her discharge Myers was interviewed and she admitted some of the complaints made about her by her subordinates. She was discharged on December 13, 2000. *Id.* at 40a, 41a. According to Waltrip, it was, ultimately, Siegel's decision to terminate Myers,

but the executive management team proposed and supported the decision that she should be discharged. *Id.* at 41a.

Moreover, in compliance with Rule 15, Respondents challenge the accuracy of the following statements characterized as facts in the Petition. Myers claims that Siegel told her his sexual fantasies. (Pet. pg. 3). There is no support for that in the record. Myers also claims that Siegel pressured her to have a ménage-a-trois with him and his wife. *Id.* This is not supported by the record. There was also no evidence that Siegel told Myers to give CFI employees free Spa gym memberships, in spite of Myers' claim to the contrary. (Pet. pp. 4, 17).

Finally, on a matter critical to Myers' assertion that Westgate's reason for her termination was pretextual, she claims that CFI set the staff salaries too high over her objections. (Pet. pg. 5). This is flat wrong and Myers' own testimony contradicts her:

> Well, what happened was that I put together my thoughts on what I thought it should be, and then met with Crystal Malcom in HR. And we sat down and she gave me her opinion as to how she thought it should be set up. And that is where a little bit of problem occurred, because just from my research in the industry, I felt that the therapists should be hired as independent contractors, and she felt that they should be hired – and receive commissions. And then she felt that they should have been hired as employees, receive commissions, and in addition, receive an

> hourly, plus benefits from Westgate. **And because I did not have experience in this prior to this, I completely trusted her judgment. And she said, Georgette, what do you feel the compensation should be for their commission, and I said 40 percent. And she said ok. And maybe because she didn't have any prior experience either in what that might equate to, we agreed on the 40 percent, plus hourly, plus benefits.** (emphasis added).

(Respondents' Appendix 1 at 2a, 3a).

PROCEDURAL HISTORY

Myers sued CFI claiming that she was sexually harassed by Siegel and ultimately fired for rejecting his advances. (App. B at 5a). The United States District Court of the Middle District (the "District Court") dismissed three of Myers' claims and then granted summary judgment to CFI on her remaining claims of sexual harassment and retaliation, which asserted a violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§ 2000e et seq., and the Florida Civil Rights Act of 1992 (FCRA), Fla.Stat. §§ 509.092, 760.01-11. The District Court also remanded her state law claims of battery and false imprisonment to state court. (App. B at 5a, 6a).

Myers appealed the District Court's grant of summary judgment to the United States Court of

Appeals for the Eleventh Circuit (the "Eleventh Circuit"). *Id.* After reviewing the evidence in the light most favorable to Myers, the Eleventh Circuit agreed with the District Court's determination that Myers failed to sufficiently link her termination to supposed harassment by Siegel. *Id.* at 7a.

The panel noted that:

> under [Myers'] version of the facts, she kept Siegel at bay for a full five years, receiving multiple promotions and pay raises during that time. Although she claimed that Siegel's attitude toward her changed when she became engaged to another man, she offered no evidence that Siegel was even aware of the engagement. Furthermore, Myers certainly knew that the CFI executives were unhappy with the Spa's performance and were holding her responsible. Myers failed to offer evidence rebutting CFI's evidence that she was discharged because of the Spa's lack of profitability.

Id. at 7a, 8a (internal citations omitted).

Because Myers could not establish a connection between her termination and her rejection of Siegel, the panel ruled that her sexual harassment claim could not survive summary judgment on the tangible employment action theory. *Id.* at 8a. Nevertheless, the panel found that Myers did present sufficient evidence to create a disputed issue of fact as to whether she experienced a hostile work environment at CFI. *Id.* In light of that determination, Myers'

state-law battery and false imprisonment claims were reinstated. *Id.* at 6a n.2.

As to Myers' retaliation claim, the panel ruled that the District Court properly concluded that Myers failed to offer evidence supporting a causal connection between any protected activity and her termination. *Id.* at 13a. As to Myers' post-termination retaliation claim the panel found that her claims failed because she could not show that Siegel's decision to file unrelated lawsuits against her was an action that "would have been materially adverse to a reasonable employee or job applicant," such that "that the employer's actions [were] harmful to the point that they could well [have] dissuade[d] a reasonable worker from making or supporting a charge of discrimination." *See also Burlington N. & Santa Fe Co. v. White,* 126 S.Ct. 2405, 2409 (2006). *See id.* at 13a n.3.

The District Court had ruled that Myers failed to present evidence supporting a causal connection between any protected activity and her termination. (App. D at 70a). Notably, Myers' complaints about Siegel to CFI's management were made only after those same managers had complained about Myers poor performance and investigated her misconduct. *Id.* at 71a. The panel likewise noted that Myers' "formal" complaints to management did not occur until after meetings took place regarding the Spa's lack of profitability. (App. B at 13a).

Moreover, the District Court ruled that Myers had not presented "such weakness, implausibilities, inconsistencies, incoherencies, or contradictions in

the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." (App. D at 77a, 78a) (citing *Cooper v. S. Co.*, 390 F.3d 695, 725 (11th Cir. 2004) (citing *Combs v. Plantation Patterns,* 106 F.3d 1519, 1538 (11th Cir. 1997)). The panel concurred with the District Court which had noted that even if Myers did establish a prima facie retaliation case, CFI had met its burden of offering a legitimate, nondiscriminatory reason for her termination under the applicable *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting framework. (App. B at 13a). The panel said there was "no question" that the Spa's profitability was a primary concern of CFI management and that they questioned Myers' ability to run the operation. *Id.* at 14a. Thus, even if the District Court had erred in relying on the proffered reasons for Myers' termination (allegations of employee misconduct and complaints filed against Myers), the panel ruled that any such error was harmless because the Spa's loss of money was a sufficient nondiscriminatory reason for her termination. *Id.* (The foregoing rulings in this case by the panel are collectively referred to as the "Opinion").

REASONS FOR DENYING WRIT

I. THE ELEVENTH CIRCUIT CORRECTLY CONCLUDED, AS HAD THE DISTRICT COURT, THAT MYERS COULD NOT SHOW THAT SIEGEL'S DECISION TO FILE UNRELATED LAWSUITS AGAINST HER AFTER SHE WAS DISCHARGED WAS RETALIATORY. THAT DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT IN *BURLINGTON NORTHERN & SANTA FE RY. CO. V. WHITE* OR WITH ANY SUBSEQUENT RELEVANT CIRCUIT COURT OPINION.

Rule 10 of the Rules of the Supreme Court states:

> Review on a writ of certiorari is not a matter of right, but judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ;
>
> * * *
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has

> decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10.

The principal purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *See Braxton v. U.S.*, 500 U.S. 344 (1991). "Special and important reasons" within this rule relating to granting of certiorari, relate to problems beyond the academic or episodic, especially where issues involved reach constitutional dimensions. *See Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955).

Here, Myers argues that it is "a matter of importance that this Court resolve an apparent split among the circuits with one side of that split departing materially from" *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006). (Pet. pg. 12).[2] However, contrary to Myers' assertion, this case

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[2] The text of this argument is, in reality, little more than a cut-and-paste job, extracted near *verbatim* from the source of which Myers notes in her Petition. (Pet. pg. 12). However, the underlying premise of the unpublished work upon which Myers entirely relies is incorrect.

presents neither a matter of importance nor any split. *See Rice,* 349 U.S. at 74; *see also* Petition for Writ of Certiorari in *Zelnik v. Fashion Institute of Technology,* Case No. 06-1199 (where petitioner sought to invoke this Court's review of the same issue raised in the instant petition) and this Court's denial of the Petition in *Zelnik v. Fashion Institute Technology,* 127 S.Ct. 2062 (2007). Instead, this case, at best, is nothing more than complaints of incorrect factual findings and the misapplication of a properly stated rule of law. *See* Sup. Ct. R. 10.

Quite contrary to Myers' argument, *Burlington Northern* neither held nor even stated in dicta that whether a retaliatory action rises to the level of material adversity can only be resolved by the trier of fact. (Pet. pg. 9). Myers ostensibly extrapolated this holding from the fact that this Court was reviewing a jury's verdict and held that "applying this standard to the facts of this case, we believe that there was a sufficient evidentiary basis to support the jury's verdict on Burlington Northern's retaliation claim." 126 S.Ct. at 2416. In fact, this Court stated that, "[w]e refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable." *Id.* at 2415 (emphasis in the original). This Court stated:

> By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial

> conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

Id. at 2416. This Court's emphasis on objectiveness, on a "judicially administrable" standard, and its references in this regard to the objective standards for constructive discharge and hostile work environment – issues routinely decided on summary judgment – suggest exactly the contrary of Myers' argument. *Id.* at 2415. Clearly, this Court implemented the objective standard so that the district courts may themselves act as gatekeepers in weeding out those trivial lawsuits by determining whether an action is sufficiently materially adverse for retaliation.

Myers' attempt to engraft a per se jury question into *Burlington Northern* is not the worst of the argument's problems. (Pet. pg. 8). Myers' intellectually flawed interpretation of this Court's decision would eliminate the burden shifting analysis of *McDonnell Douglas*, 411 U.S. at 802-03. If a plaintiff were to allege a *prima facie* case, under Myers' theory, prong two would per se become a jury question which would eliminate the employer's current right to assert a legitimate nondiscriminatory reason for the adverse employment action.

To be sure, summary judgment is inappropriate when a genuine dispute exists as to some material

fact. However, the cases cited in the Petition applied this Court's standards in *Burlington Northern* to case-specific facts, in order to determine whether a genuine issue of material fact was created. The Eleventh Circuit expressly and appropriately applied this Court's standards in *Burlington Northern* to the unique facts below and concluded that Myers could not *show* that Siegel's unrelated post-employment lawsuit against Myers constituted an adverse employment action. (App. B at 13a n.3).

Furthermore, none of Myers' cited cases make the possible retaliatory character of an employer's post-employment lawsuit automatically a per se jury question. Thus, the split among the Circuits over *Burlington Northern* which Myers portrays is an illusory one. None of those cases are at odds with *Burlington Northern,* or with the Opinion here. *See Carmona-Rivera v. Puerto Rico,* 464 F.3d 14 (1st Cir. 2006) (no evidence that delays in providing accommodations needed to meet a disability caused harm to plaintiff); *Browne v. Queen's College City University of New York,* 202 Fed. Appx. 523 (2d Cir. 2006) (no evidence that internal review of plaintiff's discrimination claim actually ceased upon transfer from Affirmative Action Committee to General Counsel's Office and transfer alone did not constitute adverse employment action); *Hanani v. State of New Jersey Dept. of Environmental Protection,* 205 Fed. Appx. 71 (3d Cir. 2006) (employer's alleged conduct of increasing employee's work volume, grammatical edits to her work, an alleged reduction in work performance

scores and an argument with a co-worker was not sufficiently severe or pervasive to support claim); *Csicsmann v. Sallada,* 2006 WL 3611729 (4th Cir. Dec. 12, 2006) (elimination of employee's position and transfer to new position were not adverse employment actions); *DeHart v. Baker Hughes Oilfield Operations,* 214 Fed. Appx. 437 (5th Cir. 2007) (written warning to employee for insubordination, being argumentative, and excessive absenteeism were not adverse employment actions because there were colorable grounds for the warning and the warning did not in fact dissuade employee's later charge of discrimination);[3] *Mickelson v. New York Life Insurance Co.,* 460 F.3d 1304 (10th Cir. 2006) (issue of fact existed regarding whether employer's denial of employee's request was based in part on employee's protected filing of salary discrimination claim).

Myers' citation to Circuit Court cases which she acknowledges follow the holding in *Burlington Northern* do not, as she suggests, demonstrate a circuit level conflict. (Pet. pp. 11, 12). Rather, those cases are largely inapposite here, as they reach case-specific results which do not conflict with the Opinion. *See Kessler v. Westchester County Dept. of Social Services,* 461 F.3d 199 (2d Cir. 2006) (genuine triable issue existed as to whether transfer of management-level employee could have dissuaded reasonable employee

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[3] Here, as in *DeHart,* it does not temporally follow that the post-employment lawsuits would have dissuaded Myers from any protected activity during her employment.

from complaining of unlawful discrimination); *Wrobel v. County of Erie,* 211 Fed. Appx. 71 (2d Cir. 2007) (Summary Order) (county employee challenged transfer decision, alleging constitutionally-protected associational conduct, as required to state First Amendment claim, and claiming he was retaliated against for his lack of political affiliation with, or his refusal to pledge his allegiance to, new county administration); *Moore v. City of Philadelphia,* 461 F.3d 331 (3d Cir. 2006) (issue whether supervisors retaliated against white police officers for their opposition to discriminatory comments made by supervisor regarding African-American officers, precluded summary judgment); *Ridley v. Costco Wholesale Corp.*, 217 Fed. Appx. 130 (3d Cir. 2007) (inference that manager knew about plaintiff's discrimination complaint but denied knowledge of same; that manager "reluctantly" subjected plaintiff to repeated discipline for minor incidents shortly after his transfer to a new location; and employer's failure to investigate plaintiff's allegations of post-demotion retaliation was sufficient evidence for jury to determine retaliation issue); *Velikonja v. Gonzales,* 466 F.3d 122 (D.C. Cir. 2006) (plaintiff's claim that she was subject to lengthy investigation, was prevented from receiving promotions during the investigation and that FBI placed a cloud over plaintiff's career supported her retaliation claim); *Czekalski v. Peters,* 475 F.3d 360 (D.C. Cir. 2007) (employee's allegations that her reassignment was effectively a demotion posed jury question).

These cases do not, as Myers' seemingly contends, negate the district court's role to consider such issues on summary judgment. Rather, they suggest only that, *on the specific facts of each case,* summary judgment was not warranted. This is entirely consistent with both the Eleventh Circuit and the District Court's conclusion that Myers simply presented no evidence from which CFI's post-termination actions could be deemed retaliatory, thus warranting summary judgment.

Respondent has located additional cases which specifically cited to the standard in *Burlington Northern* for determining whether a plaintiff has presented a material issue of fact on the question of adverse employment action. None of these cases conflict with *Burlington Northern* or the Opinion here.[4]

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[4] *See Jordan v. Chertoff,* 224 Fed. Appx. 499 (7th Cir. 2006) (employer's failure to permanently reassign employee to position; to extend employee's temporary detail on work team; to grant employee's request for overtime pay; and employee's return to her regular position could not have been materially adverse to reasonable employee); *Chang v. Safe Horizons,* 2007 WL 3254414 (2d Cir. November 5, 2007) (Summary Order) (oral and written warnings issued by employer, questioning by employer, and employer's attempt to access employee's computer do not constitute materially adverse action in the view of the reasonable employee); *Chamberlin v. Principi,* 2007 WL 2692339 (2d Cir. September 12, 2007) (Summary Order) (preventing employee from volunteering as replacement group leader was not an adverse employment action); *Mutts v. Southern Connecticut State University,* 2007 WL 2688871 (D.Conn. September 12, 2007) (being disciplined for two "incidents" and not being promoted were not adverse employment actions); *Hare v. Potter,*

(Continued on following page)

The Eleventh Circuit simply concluded that the evidence Myers adduced could not show that Siegel's decision to file an unrelated lawsuit against her was an action that "would have been materially adverse to a reasonable employee or job applicant," such that "that the employer's actions [were] harmful to the point that they could well [have] dissuade[d] a reasonable worker from making or supporting a charge of discrimination." (App. B at 13a n.3) (citing to *Burlington Northern).* The Opinion does not hold that a post-employment lawsuit can never be retaliation. But Siegel's post-employment lawsuits could not have dissuaded Myers from any protected activity during her employment. *See DeHart,* 214 Fed. Appx. at 437. In fact, the first suit preceded Myers' 2001 sexual harassment charge to the EEOC, which she filed notwithstanding that she had already been sued. So the first suit, which was not an adverse employment action as her employment had long since been terminated, was not, in fact, a potentially materially adverse retaliatory action, coming, as it did, before Myers' relevant protected activity. *Id.* Similarly, Siegel's second suit, which was filed in 2004, could

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2007 WL 4275508 (3d Cir. November 30, 2007) (while employer's refusal to allow employee into a career management program could have been a materially adverse action because the program could contribute significantly to employee's advancement and employee's receipt of a low performance rating as compared to previous years could have been the result of discriminatory animus, employee's claim failed because employee failed to present evidence of causation.)

not have dissuaded Myers from the filing of her EEOC Complaint two and one half years before.

Finally, because of her focus on her *prima facie* retaliation case, Myers' first argument also ignored the panel's conclusion that she failed to provide admissible evidence rebutting the Spa's lack of profitability, which was, without dispute, a stated reason for her termination. (App. B at 13a). Thus, unless this Court also agrees that Myers' third point in her Petition, regarding pretext, is an appropriate subject for this Court's certiorari review, this Court would simply be rendering an academic opinion on this point. *See Rice,* 349 U.S. at 74. As has thus far been shown, Myers' argument is, at its heart, simply that she disagrees with the District Court's factual findings and its application of settled rules of law to them, which was, in the main, embraced by the Eleventh Circuit. This does not make a basis for this Court's certiorari review.

II. THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS REGARDING CORPORATE ALTER EGOS IN *FARAGHER v. CITY OF BOCA RATON* OR *BURLINGTON INDUS., INC. v. ELLERTH* OR WITH ANY OTHER RELEVANT CIRCUIT COURT OPINION.

The essence of Myers' next claim is that the panel committed two errors: it disregarded her complaints to other executives of CFI because those complaints post-dated CFI's clear articulation of its profitability

concerns, and it ignored her supposed historical "complaints" to Siegel himself. (Pet. pp. 12, 13). She argues that the former was tantamount to a per se rule that makes a reprimanded employee automatically ineligible for retaliation protection for complaints that follow a presumably legitimate adverse employment action. (Pet. pg. 13). And, as to the latter, she does little other than demean the Eleventh Circuit. However, from Respondents' vantage point, Myers' argument is that every retaliation claim presents a jury question and the objective scrutiny contemplated by this Court in *Burlington Northern* has no place in a Fed. R. Civ. P. 56 analysis.

This Court has held that an inference of a causal connection based on temporal proximity is negated where there are performance issues that predate protected activity. (App. D at 71a) (citing *Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 272 (2001)). The facts are and remain undisputed that Myers complained[5] to Waltrip, Bosch, and Sandra Jones ("Jones") only *after* they first confronted Myers with deficiencies in her own performance or addressed a complaint against her. Myers' comments to Waltrip and to Bosch were made *after* a meeting regarding Spa profitability, during which they were

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[5] CFI disagrees that Myers' comments to her peers constituted complaints cognizable under Title VII. But for purposes of the arguments made at each level of these proceedings, CFI agrees that inferences arising from Myers' words need be drawn in her favor.

critical of Myers' stewardship of the Spa. *Id.* The complaint to Jones occurred only *after* she discussed with Myers the complaint made against her by one of Myers' subordinates. *Id.* Myers is obviously dissatisfied with the panel's (and the District Court's) decision and by its application of the law to the facts presented by the record before it. But, there is no conflict here, and nothing to justify this Court's certiorari review.

Next Myers argues that the panel ignored her comments to Siegel over, presumably, the entire five (5) year period during which Myers claims to have been harassed. Such comments were, according to Myers, made before, during and after CFI made its concerns regarding the Spa's profitability unmistakenly clear, only after which did CFI, *for the first time*, take any adverse employment action against Myers when it terminated her. (Pet. pg. 13). Specifically, Myers argues that the panel "rejected" what she perceives as the holding in *Faragher v. City of Boca Raton,* 524 U.S. 775, 789 (1998), and *Burlington Indus. Inc. v. Ellerth,* 524 U.S. 742, 758 (1998) that high-ranking company officials are automatically corporate alter egos imposing, essentially, strict liability in sexual harassment cases.

As a preliminary matter, the *Faragher* and *Ellerth* defense is applicable only in claims for tangible employment action sexual harassment under Title VII. *See Burlington Northern,* 126 S.Ct. 2405, 2413 (*Faragher* speaks of a Title VII requirement that violations involve "tangible employment action" . . .

"and *Ellerth* did not mention Title VII's anti-retaliation provision at all"). Thus, *Faragher* and *Ellerth* have no application here as Myers is contesting only the panel's application of the law to her retaliation claim.

Moreover, the Opinion does not "reject" *Faragher* or *Ellerth* as Myers contends. This is apparent, not only from a plain reading of the Opinion itself, but also from Myers' own words in the Petition: "one *assumes* the Court of Appeals relies on the doctrine that a complaint to the offender himself is not notice to the employing entity." (Pet. pg. 13). It is self evident that if Myers must resort to engrafting her own "assumption" into the Opinion in order to create a "phantom conflict," that there is no conflict at all. It is respectfully suggested that Myers' attempt to shamelessly invent a conflict out of thin air cannot afford a basis for this Court's certiorari review.

More importantly, *Faragher* or *Ellerth*, which did not involve retaliation claims, never created a rule, let alone a per se rule, that the position of the alleged harasser would determine whether a case must go to the jury. Myers essentially argues that because her alleged harasser was the CEO of the company her claims are not subject to summary judgment scrutiny and, most importantly, she is not obliged, like other plaintiffs, to prove each element of *all* her claims. Indeed, what Myers suggests here is contrary to this Courts' holding in *Faragher* or *Ellerth* and to the subsequent application of these holdings by trial and appellate courts.

For example, the Eleventh Circuit recently rejected a similar argument. *Dearth v. Collins*, 441 F.3d 931, 935-36 (11th Cir. 2006), involved a sexually hostile work environment claim under Title VII where the plaintiff, like Myers, rejected the alleged sexual advances of the company's president. The plaintiff argued that strict liability could be imposed on the company, on the basis of the alter ego doctrine, because the alleged harasser was the company's president and sole shareholder. *Id.* at 933. The plaintiff further implicitly argued that the company was precluded from utilizing the *Faragher-Ellerth* defenses because of the position of the alleged offender in the company. The Eleventh Circuit dismissed plaintiff's argument that the *Faragher-Ellerth* defense was inapplicable as "lack[ing] merit." *Id.* at 936. The plaintiff, like Myers here, could not rebut the evidence presented by the employer that she was discharged for job performance.

It is evident that there is no conflict among the Eleventh Circuit's relevant interpretations of the holdings of *Faragher* or *Ellerth* warranting consideration of the issue in this case. The fact that Siegel is the CEO of CFI is, according to *Faragher-Ellerth,* of no moment. Whether an affirmative defense is available and/or whether strict liability is imposed depends on the presence of a tangible employment action claim. That is not the issue here, as a *Faragher-Ellerth* affirmative defense did not figure in CFI's defense of the tangible employment action

claim that Myers did pursue; the summary judgment in favor of CFI on that claim is not before this Court.

More to the point, Siegel's position within CFI does not affect or diminish Myers' burden of proof regarding her retaliation claim. She was required to show that she engaged in a protected activity and that there was a causal relationship between that activity and her termination. She simply did not meet the burden.

Finally, the panel affirmed the District Court's holding that Myers failed to offer evidence rebutting CFI's evidence that she was terminated because of the Spa's lack of profitability. (App. B at 13a, 14a). This holding applied to both Myers' retaliation and tangible employment action sexual harassment claims. *Id.* The District Court also noted that regardless of the different analysis between retaliation claims and the sexual harassment claims, "there is some overlap in the consideration of the claims and in the issues of causation and pretext." (App. D at 65a n.24). The District Court concluded that Myers failed to present evidence supporting a causal connection between any harassment and her termination. *Id.* at 61a. Noting that it "need not *weigh* evidence in order to find a *lack* of evidence of a causal connection," the District Court ruled that temporal proximity between harassment and a tangible employment action does not always give rise to a genuine issue of fact as to causation. *Id.*

Myers acknowledged throughout her deposition that she never suffered any adverse consequences at work after her express rejections of Siegel. *Id.* Despite rejecting Siegel in 1995, 1996 and thereafter Myers advanced at the company rather than suffered. *Id.* From March or April 2000 until November 2000, Siegel allowed Myers to stay at a condominium he owned while her own condominium was being renovated. *Id.* Myers did not describe any change in Siegel's behavior over this time; she merely speculated that, notwithstanding his perceived generosity and absence of outward indicia, he was upset and jealous because she became engaged to Cleve Loveland ("Loveland") in late 2000.[6] *Id.* Such speculation, layered as it was upon a complete absence of admissible evidence, was insufficient to establish a causal connection between her periodic rejections of Siegel and her termination, especially considering the overwhelming admissible evidence of longstanding concerns about Myers' management of the Spa, of which Myers was aware even before she met Loveland. *Id.*

Myers was discharged following an investigation that was initiated by Toth's complaint. Myers herself acknowledged that CFI's executive management was dissatisfied with Myers' management of the Spa and had been so for quite some time. *Id.* Myers admitted

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[6] Nor is sheer speculation sufficient to reduce an otherwise indisputably legitimate reason for Myers' termination to pretext, as will be discussed in Part III *infra*.

to at least some of the complaints made against her during the investigation that preceded her termination. *Id.* Thus, the District Court concluded, even accepting as true Myers' evidence of harassment in the fall of 2000, there was "no reasonable inference of a causal connection between her rejections of that harassment and her termination." *Id.* at 62a, 63a.

The Eleventh Circuit reviewed the evidence in the light most favorable to Myers and agreed with the District Court's determination that Myers failed to sufficiently link her termination to her relationship with Siegel. (App. B at 7a). Under her version of the facts, she kept Siegel "at bay" for a full five years, receiving multiple promotions and pay raises during that time. *Id.* at 7a, 8a. Although she claimed that Siegel's attitude toward her changed when she became engaged to Loveland, she offered no evidence that Siegel even knew of the engagement. *Id.* at 8a. Myers also "certainly knew that the CFI executives were unhappy with the Spa's performance and were holding her responsible." *Id.* Like Myers' first point, this point, standing alone, inappropriately seeks an academic opinion by this Court, and, in any event, does not invoke any "conflict," but only, again, portrays the District Court's factual findings as erroneous and both lower courts' application of correctly stated principles of law to those facts as wrong.

III. THE ELEVENTH CIRCUIT'S OPINION REJECTING MYERS' SPECULATIVE CLAIM OF PRETEXT AND SUSTAINING CFI'S LEGITIMATE NONDISCRIMINATORY REASON FOR DISCHARGING MYERS, WHICH MYERS WHOLLY FAILED TO REBUT, DID NOT CONFLICT WITH ANY RELEVANT DECISION OF THIS COURT OR WITH ANY OTHER RELEVANT CIRCUIT COURT OPINION.

In Myers' first argument she at least paid lip service to a basis for this Court's certiorari jurisdiction, to wit: a conflict. In her second argument she invented a "phantom" conflict. In her third argument Myers utterly fails to even argue any conflict with the panel's ruling on pretext.

First, Myers claims that the panel erred by "irrebuttably" presuming the Spa's lack of profitability motivated Siegel to fire Myers. (Pet. pg. 15). At the outset, a review of the Opinion reveals no such "irrebuttable" presumption by the panel, but rather its observation that Myers failed to adduce any evidence to the contrary. Reduced to its essence, Myers' argument simply seeks to turn the Eleventh Circuit, from whom she did not receive satisfaction, into nothing more than an intermediate stop and morph this Court into an ultra-super-personnel department to, for a third time, examine CFI's business decisions.

As the District Court opined: "the inquiry into pretext centers upon the employer's beliefs and not the employee's own perceptions of [her] performance."

(App. D at 77a) (citing *Holifield v. Reno,* 115 F.3d 1555, 1565 (11th Cir. 1997)). "Title VII is not designed to make federal courts sit as a super-personnel department that re-examines an entity's business decisions." (citing *Davis v. Town of Lake Park, Fla.,* 245 F.3d 1232, 1244 (11th Cir. 2001)). Myers simply cannot establish pretext by "'questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer'" *Id.* (citing *Tidwell v. Carter Prods.,* 135 F.3d 1422, 1427 (11th Cir. 1998)).

Moreover, the District Court ruled that even if Myers had stated a *prima facie* case of retaliation, CFI met its burden of articulating a legitimate, nondiscriminatory reason for terminating Myers which she failed to rebut. (App. D at 72a). Thus, the District Court held that CFI was entitled to summary judgment on the retaliatory termination claims because Myers had not presented "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Id.* at 73a, 78a (internal citations omitted). The Eleventh Circuit properly affirmed this ruling. (App. B at 13a, 14a). Myers does not suggest that any of the cases cited by the District Court were misinterpreted; she simply disagrees with the conclusion the District Court reached when it applied them and with the Eleventh Circuit agreement.

The District Court's decision rested on whether the facts, unique to Myers' case, were sufficient as a matter of law to survive the Motion for Summary Judgment on Myers' retaliation claims. The very fact that Myers resorts to her hackneyed claim that the panel "overlooked" her "strong circumstantial" evidence, (Pet. pp. 17, 19, 20) reveals that Myers' argument is based on her perceived erroneous factual findings or the misapplication of a properly stated rule of law, not on any real conflict. Indeed, the evidence amply supported the panel's affirmance of the District Court's ruling in CFI's favor on the retaliation claim.

Myers conceded that how to market and run the Spa had been an issue since even before the Spa opened – more than a year before she was terminated. (App. D at 73a). She was aware of Siegel's concerns and unhappiness with her Spa management well before she was terminated. *Id.* In Myers' own memorandum dated November 15, 1999, written while she was dating Siegel's son, Richard, months before she was linked with Loveland, and more than a year before she was terminated, she told Siegel:

> I give up! Since it is apparent you do not trust my management ability and you have once again put an obstacle in front of me this time unfortunately I do not know how I will overcome. [sic]. To expect a brand new business to make money in the first two weeks of operation is not only unrealistic, but unheard of.

Id.

This memorandum underscored the obvious: Myers disagreed with her boss about how to run the business. She also acknowledged that she and Waltrip never saw eye to eye and that she had a target on her back as far as Waltrip was concerned; he did not like her or anyone else who bypassed him and got into favor with Siegel. *Id.* at 75a. After Waltrip again discussed the Spa's lack of profitability with her in October, 2000 and suggested she focus on design rather than management, Myers went to Siegel seeking reassurance for her job because she didn't trust Waltrip. *Id.*

In the face of the actual evidence – which came from Myers herself, not CFI – the District Court found that Myers' theory that she was terminated because Siegel was jealous of her engagement to Loveland, based, if at all, on Myers' own speculation which she now characterizes as "circumstantial evidence," did "not hold up." *Id.* The Eleventh Circuit, in affirming the District Court agreed that there was no question that the Spa's profitability was a primary concern of CFI and that they questioned her ability to run the Spa. That admissible evidence, standing alone, provided a sufficient nondiscriminatory reason for her termination. (App. B at 13a, 14a).

Myers claims that "common sense tells us that this was the work of a spurned suitor, not a disappointed employer." (Pet. pg. 18). However, common sense itself balks at such a notion in the face of a complete lack of any real evidence, no matter how pruriently Myers' fertile imagination views the events preceding her termination. What Myers misses is

that circumstantial evidence is still evidence; what Myers calls the conjecture, speculation and theory upon which she bases her argument does not rise to that level. That is what the District Court and the Circuit Court aptly concluded.

Next, Myers cites to *Howard v. BP Oil Co., Inc.*, 32 F.3d 520, 526 (11th Cir. 1994) for the proposition that CFI's "shifting explanations" for the firing are evidence enough of pretext to get to a jury. (Pet. pg. 18). However, *Howard* is inapposite here. In *Howard*, a black plaintiff presented evidence that defendant, who admitted to a lack of written criteria, testified inconsistently about the qualifications of those to whom dealerships were awarded. *Id.* Not surprisingly, the Eleventh Circuit viewed defendant's subjective and ad hoc criteria for awarding gas station dealerships with the greater scrutiny appropriate in a § 1981 action alleging racial discrimination than it would have had defendant strictly followed written criteria. *Id.*

Here, the District Court discerned no such inconsistency. Indeed, CFI presented multiple grounds, all of them legitimate, to terminate Myers, even if all of them were not, in fact, used. (App. D at 75a). In the Motion for Summary Judgment, CFI argued "[w]hile her termination was justified for several reasons, the main reason for Myers' termination was her inability to make a profit, or, at least, reduce the Spa's losses." *Id.* at 76a. The District Court did not read this as either inconsistent with or an abandonment of other potentially legitimate reasons, such as the results of the investigation prompted by Toth's complaint. *Id.*

Myers acknowledged Siegel was "all about dollars." *Id.* at 77a. The District Court was not surprised that Siegel would emphasize "the numbers" when asked why Myers was terminated. *Id.* The District Court rightly concluded that Siegel's explanation was consistent with that of the witnesses who were involved in the investigation of the Toth complaint; it was clear that the investigation, in which Myers actually admitted to instances of misconduct, was the last straw as far as Myers' employment was concerned.

The premise of Myers' argument is flawed. She describes, in her Petition, the "circumstantial" evidence she claims gave rise to a jury question without providing references to the record that Myers has provided to this Court. The problem is that she did the same thing before the District Court and before the Eleventh Circuit, and they found her offerings unpersuasive. The absence of support, other than Myers' imagination, in the record before the courts below doomed this argument there. It is not appropriate for Myers to wheel this out a third time, especially as there is no basis in the record actually before this Court for what Myers asserts was ignored by both prior courts. Certainly, Myers has presented no basis for certiorari review.

Turning to the record that was actually before the courts below, as the District Court noted, the record was replete with testimony from Myers, Siegel and Waltrip that the Spa was not profitable and Myers knew so, and that Myers knew, from the

outset, that this was *the* critical demand made by her employer. *Id.* at 37a. All matters affecting Myers' termination were substantiated and all of them were true. Understandably, the importance of each reason varied by witness. That did not render any of the reasons false. The District Court found Myers' termination justified and not retaliatory, entitling CFI to summary judgment. *Id.* at 77a, 78a.

The panel did not disagree with the District Court's conclusion that there was no inconsistency. Instead, the Eleventh Circuit ruled that "[*e*]*ven if* the district court erred in relying on the other proffered reasons for Myers' termination (allegations of employee misconduct and complaints filed against Myers), any such error was harmless because the Spa's loss of money was a sufficient nondiscriminatory reason for her termination." (emphasis added) (App. B at 14a). This ruling comports with *Holifield,* 115 F.3d at 1565; *Davis,* 245 F.3d at 1244; and *Tidwell,* 135 F.3d at 1427. Even Myers does not claim that this ruling conflicts with another decision.

Thus, despite her contention to the contrary, Myers did not present any evidence that any of the cited reasons were false or would otherwise allow a jury to disbelieve Siegel's stated reason for her termination and infer intentional discrimination in the firing. (Pet. pg. 19) (citing *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 147 (2000)) and *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511 (1993)). The demonstrated absence of such evidence proved critical to both courts below.

Moreover, in *Reeves,* this Court held that a plaintiff's *prima facie* case, combined with sufficient evidence to find that an employer's asserted justification is false, only "may" permit the trier of fact to conclude that the employer unlawfully discriminated. *Reeves,* 530 U.S. at 148. However, this Court quickly added

> that is not to say that such a showing by plaintiff will *always* be adequate to sustain a jury's finding of liability . . . For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id. at 148 (emphasis in the original).

In *St. Mary's,* this Court held that the rejection of a defendant's proffered reasons does not compel judgment for the plaintiff, because a contrary ruling would disregard the fundamental principle that a presumption does not shift the burden of proof and would ignore this Court's repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion." *St. Mary's,* 509 U.S. at 511.

Here, not only was Myers unable to establish a *prima facie* case, but she failed to put forth any evidence that CFI's reasons were false or that its actions were unjustified. Therefore, according to the

cases upon which Myers relies, the trier of fact could not conclude that CFI unlawfully discriminated against Myers. In any event, Myers' argument is predicated upon nothing more than factual findings she perceives to be erroneous and well-established, noncontroversial rules of law she deems misapplied, neither of which is a basis for certiorari review.

CONCLUSION

For the reasons suggested above the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAWN GEORGETTE MYERS,

Plaintiff,

vs.

CENTRAL FLORIDA INVESTMENTS, INC., CFI SALES & MARKETING, LTD., WESTGATE RESORTS, INC., WESTGATE RESORTS, LTD., and DAVID SIEGEL,

Defendants. /

CASE NO.
6:04-cv-1542-Orl-28DAB

VOLUME I

Videotaped Deposition of:	Dawn Georgette Myers
Taken by:	The Defendants
Date:	November 30, 2005
Time:	9:17 a.m
Location:	Zacco & Associates 605 East Robinson Street Orlando, Florida
Reported by:	Elizabeth M. Love, RPR

* * *

[164] period of time?

A. Yes, sir, I was.

Q. Okay.

A. And then I think the next increase came when I wasn't selling timeshare anymore and I was full-blown into developing the spa. And then the final increase came when I put together the – my spa's – the staff salary requirements, and myself was included in there, and David approved all of the requirements.

Q. Okay. So at that point, you created, I guess, a spreadsheet of the various positions and what the salary structure was going to be, and of course, on that spreadsheet was the spa director, which was you; right?

A. Yes, sir.

Q. And you specified the compensation level that you wanted; right?

A. Well, what had happened was I put together my thoughts on what I thought it should be, and then I met with Crystal Malcolm in HR. And we sat down and she gave me her opinion as to how she thought it should be set up. And that was where a little bit of the problem occurred, because just from my research in the industry, I felt that the therapists should have been hired as independent contractors, and she felt that they should have been hired – and receive commission. And then she felt that [165] they should have been hired as employees, receive commission,

and in addition, receive an hourly, plus benefits from Westgate.

And because I did not have any experience in this prior to this, I completely trusted her judgment. And she said, Georgette, what do you feel the compensation should be for their commission, and I said 40 percent. And she said okay. And maybe because she didn't have any prior experience either in what that might equate to, we agreed on the 40 percent, plus hourly, plus benefits.

And then I spoke with Mr. Siegel individually and – I would say maybe for a year prior to that, David and I had had conversations about what I would be making once the spa was up and running. And –

Q. What were those conversations?

A. Well, of course I told him what I wanted to make.

Q. Which was?

A. I said, you know, I want to at least make 100,000 a year, because I was working really hard and my intention was to put spas at every resort that we did from that point on. And I felt like I deserved it. I was a director and I knew what the other directors were making in the company, and actually 100,000 is a lot less than what the other directors are making in the company. So I

* * *